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In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

JOSE LUIS COLLAZO,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Have the appellate courts of Pennsylvania rendered a decision in conflict with the established law articulated by this Honorable Court in finding that the provisions regarding sexually violent predators within the Pennsylvania Megan's Law, 42 Pa.C.S. §§ 9791 – 9799.6, violated the Respondent's constitutional rights, as well as those individuals similarly situated, under the Due Process Clause of the Fourteenth Amendment, pursuant to the decision of the Pennsylvania Supreme Court in *Commonwealth v. Williams*, 84 W.D. Appeal Docket 1997, 1999 WL 441873 (Pa. 1999)?

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OPINIONS AND ORDERS ENTERED BELOW

The July 30, 1999, order of the Supreme Court of Pennsylvania denying the Petitioner's Petition for Allowance of Appeal, is unpublished and reprinted in the Appendix at App. 4. The March 23, 1999, judgment and opinion of the Superior Court of Pennsylvania, is unpublished and reprinted in the Appendix at App. 1-3. The May 7, 1998, opinion of the Court of Common Pleas of York County is unpublished and reprinted in the Appendix at App. 9-13.

STATEMENT OF JURISDICTION

This is a Pennsylvania criminal prosecution conducted by and through the Office of the District Attorney of York County, in which the Respondent filed a post-sentence motion before the trial court, the York County Court of Common Pleas, seeking to have the Respondent's sentence vacated by finding the Pennsylvania Megan's Law to be unconstitutional under seven separate constitutional challenges. The motion included a challenge to the designation of the Respondent as a sexually violent predator under Megan's Law, asserting that provision to be unconstitutional under the Fourteenth Amendment of the United States Constitution. On May 7, 1998, the trial court issued an Opinion and Order denying the Respondent's post-sentence motion, finding Megan's Law to be constitutional.

Upon appeal by the Respondent, the intermediate state appellate court, the Superior Court of Pennsylvania, reversed and remanded the judgment of sentence in a

judgment and opinion dated March 23, 1999, based upon its decision in *Commonwealth v. Halye*, 719 A.2d 763 (Pa.Super. 1998), finding the sexually violent predator provisions of Megan's Law violative of the Due Process Clause of the Fourteenth Amendment. The Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. On July 30, 1999, the Pennsylvania Supreme Court denied the Petitioner's Petition for Allowance of Appeal based upon its decision in *Commonwealth v. Williams*, 84 W.D. Appeal Docket 1997, 1999 WL 441873 (Pa.), which held that the sexually violent predator provisions of Megan's Law violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The jurisdiction of this Honorable Court to review the final judgment of the Pennsylvania appellate courts, based upon its construction of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, is invoked under 28 U.S.C. § 1257(a).

THE CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of Section 1 of the Fourteenth Amendment of the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The statutory provisions involved within this petition are found in Title 42, Sections 9791 – 9799.6, Subchapter

H, entitled, Registration of Sexual Offenders, 42 Pa.C.S. §§ 9791 – 9799.6, with the common title the Pennsylvania Megan's Law, and is reprinted in the Appendix at App. 95-118.

CONCISE STATEMENT OF THE CASE

This case is one of numerous cases within Pennsylvania wherein the designation of a defendant as a sexually violent predator under the Pennsylvania Megan's Law has been vacated due to the determination of the Pennsylvania Supreme Court that the sexually violent predator provisions of Megan's Law were unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

On July 9, 1997, the Respondent entered pleas of *nolo contendere* to one count of Indecent Assault, 18 Pa.C.S. § 3126, and one count of Corruption of Minors, 18 Pa.C.S. § 6301. The underlying facts supporting these charges are that between August of 1996 and January 8, 1997, the Respondent had indecent contact with his nine-year-old daughter, B.C., on three separate occasions. On the first occasion, between August, 1996, and Thanksgiving of 1996, the Respondent forced his daughter to rub his penis with her hand until "white stuff" came out of the Respondent's penis. The second incident occurred between Thanksgiving of 1996 and the school vacation for Christmas of that same year, when the Respondent pulled his daughter's pants down and caused contact between his penis and her buttock area. The third and final incident occurred between Christmas of 1996 and January 8,

1997, when the Respondent again forced his daughter to rub his penis with her hand until "stuff" came out of the Respondent's penis.

Because the Respondent pled *nolo contendere* to indecent assault, the trial court ordered the Respondent to be evaluated by the Sexual Offender's Assessment Board. The Commonwealth agreed, however, that the Respondent should receive a probationary sentence depending upon whether the Respondent was subject to the mandatory sentencing provisions of Megan's Law, 42 Pa.C.S. §§ 9791 – 9799.6. On August 29, 1997, the Sexual Offender Assessment Board provided the results of the evaluations of the Respondent to the trial court and counsel. The determinations of the two board members were based upon a review of all pertinent records and a complete interview with the Respondent. Following the evaluation process, the board members reached differing conclusions on whether the Respondent was a sexually violent predator, one finding the Respondent was a sexually violent predator and one finding he was not.

On September 12, 1997, the trial court held a hearing pursuant to Megan's Law to determine whether the Respondent should be designated a sexually violent predator and impose a corresponding sentence upon the Respondent. Following the arguments of counsel and statements by both the Respondent and his wife, Wendy Collazo, the trial court determined that the Respondent was a sexually violent predator. The trial court sentenced the Respondent to an aggregate sentence of lifetime probation, with five of those years on intensive probation.

On October 10, 1997, the Respondent filed a notice of appeal to the Superior Court. On October 29, 1997, the trial court issued an Opinion pursuant to Pa.R.A.P. 1925(a) in support of its imposition of sentence, wherein the trial court deemed as waived the Respondent's challenges to the constitutionality of Megan's Law since the Respondent did not previously present those issues before the trial court. On December 17, 1997, the Respondent's trial counsel petitioned the Superior Court to withdraw as counsel so that he could be found ineffective for failing to raise the constitutional challenges in post-sentence motions before the trial court. On December 22, 1997, the Superior Court granted the petition to withdraw as counsel and remanded this case to the trial court for the appointment of new counsel, which the trial court did on January 5, 1998.

On March 12, 1998, the Superior Court entered an Order allowing the Respondent to file post-sentence motions *nunc pro tunc* and remanded the appeal for a hearing to determine whether trial counsel was ineffective. On March 30, 1998, the Respondent filed post-sentence motions, upon which a hearing was held on April 2, 1998. At this hearing, the Commonwealth conceded the issue regarding the ineffectiveness of trial counsel. Following arguments concerning the constitutionality of Megan's Law, the trial court ordered each party to file a memorandum of law on these issues, which the Commonwealth filed on April 20, 1998. On May 7, 1998, the trial court issued an Opinion and Order denying the Respondent's post-sentence motions.

The Respondent filed a timely appeal to the Superior Court challenging the trial court's denial of his post-

sentence motions. In this appeal, the Respondent raised seven separate challenges to the constitutionality of Megan's Law, including a Fourteenth Amendment due process challenge to the burden of proof and burden of persuasion required under Megan's Law. After the filing of this appeal but before the conclusion of briefing and argument on the Respondent's appeal, the Superior Court issued its *en banc* decisions in *Commonwealth v. Halye*, 719 A.2d 763 (Pa.Super. 1998), where the Superior Court held that Megan's Law was unconstitutional under the Due Process Clause of the Fourteenth Amendment. Following the timely filing of briefs in this matter, argument was held before a panel of the Superior Court on February 25, 1999. On March 23, 1999, the Superior Court reversed and remanded this case for re-sentencing, holding that the *en banc* decision of the Superior Court in *Halye* controlled this case.

On April 22, 1999, the Petitioner filed a Petition for Allowance of Appeal before the Supreme Court of Pennsylvania. While this petition was pending before the Pennsylvania Supreme Court, the Court issued its decision in *Commonwealth v. Williams*, 84 W.D. Appeal Docket 1997, 1999 WL 441873 (Pa. 1999), wherein the Court held that the provisions in Megan's Law pertaining to sexually violent predators were unconstitutional as they violated the Due Process Clause of the Fourteenth Amendment. On July 30, 1999, the Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal, specifically citing to its decision in *Williams* within its order. Because of the failure of the Pennsylvania appellate courts to properly consider the applicable law articulated by this Honorable Court regarding the Due Process

Clause of the Fourteenth Amendment, the Petitioner files this Petition for *Writ of Certiorari*.

CONCISE STATEMENT FOR REASONS ALLOWING THE WRIT

The Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal, citing to its opinion in *Commonwealth v. Williams*, 84 W.D. Appeal Docket 1997, 1999 WL 441873 (Pa. 1999), wherein the Pennsylvania Supreme Court held that the Pennsylvania Megan's Law was unconstitutional under the Due Process Clause of the Fourteenth Amendment. Prior to that action by the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania vacated the Respondent's sentence pursuant to that court's *en banc* decision in *Commonwealth v. Hayle*, 719 A.2d 763 (Pa.Super. 1998). The Superior Court issued *Hayle* while the *Williams* decision was pending before the Pennsylvania Supreme Court, wherein the Superior Court held that Megan's Law was unconstitutional under the Due Process Clause of the Fourteenth Amendment. The Petitioner challenges this conclusion formed by the appellate courts of Pennsylvania in this petition for the following reasons. First, the Supreme Court of Pennsylvania failed to apply the appropriate case law and legal standards governing due process issues under the Fourteenth Amendment, which include the recent decisions of this Honorable Court in *Almendarez-Torres v. United States*, ___ U.S. ___, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) and *Monge v. California*, ___ U.S. ___, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). Furthermore, the Petitioner asserts that the Pennsylvania Supreme

Court failed to develop and preserve a reading of the Constitution as an organic whole versus a series of legal fragments, which promotes a piecemeal application of the Constitution to Megan's Law.

Before the Petitioner discusses the erroneous constitutional analysis conducted by the Supreme Court of Pennsylvania, an initial overview of the Pennsylvania Megan's Law is required. Effective since October 24, 1995, the Pennsylvania Megan's Law, 42 Pa.C.S. §§ 9791 – 9799.6, established a mechanism to protect the citizens of this Commonwealth from the specter of sexually violent predators. A sexually violent predator is defined in the statute as "[a] person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9792. The mechanism used for determining who is a sexually violent predator was established by the Legislature in 42 Pa.C.S. § 9794:

> **(a) Order for assessment.** – After conviction, but before sentencing, a court shall order a person convicted of a sexually violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the [State Board to Assess Sexually Violent Predators]. The order for an assessment shall be sent to the administrative officer of the board within ten days of the date of conviction.

(b) Presumption. – An offender convicted of any offense set forth for an assessment, two members of the board as designated by the administrative officer of the board shall conduct an assessment of the offender to determine if the offender is a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

(c) Assessment. – Upon receipt from the court of an order for assessment, two members of the board as designated by the administrative officer of the board shall conduct an assessment of the offender to determine if the offender is a sexually violent predator. Such an assessment shall include, but not be limited to, such factors as:

(1) Age of the offender.

(2) Offender's prior criminal record, sexual offenses as well as other offenses.

(3) Age of the victim.

(4) Whether the offense involved multiple victims.

(5) Use of illegal drugs by the offender.

(6) Whether the offender completed any prior sentence and whether the offender participated in available programs for sexual offenders.

(7) Any mental illness or mental disability of the offender.

(8) The nature of the sexual contact with the victim and whether the sexual contact was part of a demonstrated pattern of abuse.

(9) Whether the offense included a display of unusual cruelty by the offender during the commission of the crime.

(10) Any behavioral characteristics that contribute to the offender's conduct.

All State, county and local agencies shall cooperate in providing the necessary information as requested by the board in connection with the required assessment.

(d) Submission of report by the board. – The board shall submit a written report containing its assessment to the court no later than 60 days from the date of conviction of the defendant. Where the board members disagree on the assessment of the offender, both members shall submit a written report to the court.

(e) Court review of findings. – Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania

> Board of Probation and Parole and the Department of Corrections.
>
> **(f) Subsequent board review.** – No sooner than one year prior to release from a State or county correctional institution, or in five-year intervals thereafter, an offender designated as a sexually violent predator may petition the court with original jurisdiction in the matter for reconsideration of the determination. The court may review the determination and request a new report by the board. The court may enter an order terminating the designation in which case the court shall notify the Pennsylvania State Police.

Upon a determination of the lower court that the defendant is a sexually violent predator, the lower court must sentence the defendant to a mandatory maximum sentence of life imprisonment. 42 Pa.C.S. § 9799.4(a). Furthermore, a subsequent conviction of a sexually violent predator for these offenses requires a mandatory sentence of life imprisonment. 42 Pa.C.S. § 9799.4(c).

Besides the change in the sentencing structure for those convicted of sexual offenses who are designated as sexually violent predators, the statute provides notification requirements for sexually violent predators in conjunction with their sentencing:

> **(a) By municipality's chief law enforcement officer.** – Notwithstanding any of the provisions of 18 Pa.C.S. Ch. 91 (relating to criminal history record information), the chief law enforcement officer of the police department of the municipality where a sexually violent predator lives shall be responsible for providing written notice as required under this section.

(1) The notice shall contain:

(i) The name of the convicted sexually violent predator.

(ii) The address or addresses at which he resides.

(iii) The offense for which he was convicted.

(iv) A statement that he has been designated by court order as a sexually violent predator, which designation has or has not been terminated as of a date certain.

(v) A photograph of the sexually violent predator, if available.

(2) The notice shall not include any information that might reveal the victim's name, identity and residence.

(b) To whom written notice is provided. – The chief law enforcement officer shall provide written notice, under subsection (a), to the following persons:

(1) Neighbors of the sexually violent predator.

(2) The director of the county children and youth service agency of the county where the sexually violent predator resides.

(3) The superintendent of each school district and the equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality.

> (4) The director of each licensed day care center and licensed preschool program in the municipality.
>
> (5) The president of each college, university and community college located within 1,000 feet of a sexually violent predator's address.
>
> **(c) Urgency of notification.** – The municipal police department's chief law enforcement officer shall provide notice within the following time frames:
>
> (1) To neighbors, notice shall be provided within 72 hours after information of the sexually violent predator's release date and address has been received by the chief law enforcement officer. Notwithstanding the provisions of subsections (a) and (b), verbal notification may be used if written notification would delay meeting this time requirement.
>
> (2) To the persons specified in subsection (b)(2), (3), (4) and (5), notice shall be provided within seven days after the chief law enforcement officer receives information regarding the sexually violent predator's release date and address.
>
> **(d) Public notice.** – All information provided in accordance with subsection (a) shall be available, upon request, to the general public.

42 Pa.C.S. § 9798. Megan's Law further provides for the registration of current addresses possessed by sexually violent offenders with the Pennsylvania State Police or other applicable agencies, 42 Pa.C.S. § 9795, as well as

verification of all current addresses and notification of all changes in address, 42 Pa.C.S. § 9796.

The Pennsylvania Supreme Court interpreted the goals of the sexually violent predator provisions of Megan's Law correctly by declaring that they are punitive in nature due to the increase in the maximum-mandatory sentence that results for those defendants found to be sexually violent predators. In turn this makes the hearing to determine and final designation of a defendant as a sexually violent predator a criminal proceeding to determine the imposition of a sentencing enhancement. The Pennsylvania Supreme Court also properly pointed out that the determination of whether a defendant is a sexually violent predator is a factual finding. And while the Supreme Court of Pennsylvania also correctly states the role of the trial court as the ultimate finder of fact regarding whether a defendant is a sexually violent predator, the Court virtually ignores its statutory determination regarding this crucial fact-finding mandate within the statute throughout the *Williams* opinion, and leads to an initial erroneous reliance on the Third Circuit's decision in *E.B. v. Verniero,* 119 F.3d 1077 (3rd Cir. 1997), *cert. denied,* ___ U.S. ___, 118 S.Ct. 1039, ___ L.Ed.2d ___ (1998).

In *Verniero* the Third Circuit held that the Tier 2 and Tier 3 classifications of sexual offenders for notification purposes under the New Jersey Megan's Law were unconstitutional pursuant to the Fourteenth Amendment Due Process Clause. The Pennsylvania Supreme Court attempts to rely upon the *Verniero* holding by claiming that the New Jersey and Pennsylvania Megan's law statutes are similar. The *Williams* Court, however, also conceded that the two statutes had "many differences", and

only spoke about the "relevant similarities" with vague generalities. *Williams*, 84 W.D. Appeal Docket 1997, 1999 WL 441873, ___ (Pa. 1999). In fact, as Judge Kate Ford Elliott of the Superior Court of Pennsylvania noted in her dissenting opinion on this issue in *Commonwealth v. Halye*, 719 A.2d 763 (Pa.Super. 1998), it was the dissimilarities between the New Jersey and Pennsylvania versions of Megan's Law that produced the outcome in *Verniero*:

> The Third Circuit found it particularly significant that *prosecutors* assessed the risk of re-offense; that the offender bore the burden of persuasion in a summary *in camera* proceeding potentially held years after conviction; and that the court's review was limited to deciding only whether the prosecutors selected the correct Tier classification. Within the context of the New Jersey hearing, the offender's ability to test the prosecutors' determination was severely limited, as was his ability to call and confront witnesses.

Halye at 771 (Ford Elliott, J., concurring and dissenting). It is most significant then that none of these critical factors of unconstitutionality exist in Pennsylvania's Megan's law. Under the Pennsylvania statute, as acknowledged by the Pennsylvania Supreme Court, the trial court designates who is a sexually violent predator at a hearing following a guilty plea or verdict against a defendant for one of the statutorily enumerated crimes. Moreover, the trial court makes this determination by utilizing statutorily mandated factors that mirror those considerations traditionally employed by courts at sentencing. While the Sexual Offender Assessment Board does render an opinion regarding whether a defendant is

a sexually violent predator after implementing the procedures required by statute, this determination by the Board is neither the entry of an order based upon a finding of fact nor is it binding upon the trial court in determining whether a defendant is a sexually violent predator. This involvement of the courts as the finder of fact, which the *Williams* Court recognizes and then ignores, drastically distinguishes the proceedings under Pennsylvania's Megan's Law from those employed under the New Jersey tier system, where the prosecutor served as the fact-finder.

In conjunction with its misguided comparison between the Pennsylvania and New Jersey Megan's Law, the *Williams* court erroneously distinguished the role of fact finding between the Pennsylvania Megan's Law designation of sexually violent predators and the sentencing enhancement for the visible possession of a firearm found at 42 Pa.C.S. § 9712 and upheld in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). Under § 9712, following the conviction of an enumerated offense and notice of mandatory minimum sentencing by the Commonwealth to the defendant, the trial court must sentence the defendant to a mandatory minimum sentence of five years incarceration upon finding that the defendant visibly possessed a firearm. While Petitioner will discuss momentarily the constitutional ramifications of *McMillan* with regards to the Due Process Clause, Petitioner first notes that the Pennsylvania Supreme Court attempted to distinguish the fact finding roles of the courts within the two statutory schemes. The Supreme Court of Pennsylvania characterized the determination of visible possession of a firearm as a

" 'straightforward issue susceptible of objective proof' and where 'the risk of error [was] slight.' " *Williams, supra*. The Pennsylvania Supreme Court then contrasted the sexually violent predator designation as an assessment of a defendant's future dangerousness that creates a higher risk of error than the factual determinations under § 9712. This conclusion by the Supreme Court of Pennsylvania, however, thoroughly and completely ignores that the trial court's fact finding determination regarding a defendant being a sexually violent predator follows guidelines and considers factors that are the same as those utilized by the courts in sentencing proceedings. To say that the risk of error at a sexually violent predator hearing conducted by the court is "far greater" than at a proceeding to determine whether a defendant visibly possessed a firearm, which is inherently filled with all the potential pitfalls associated with evidentiary presentations at trial, is to cast doubt upon the competence of our courts to fulfill their learned duties in imposing a sentence upon a defendant following conviction. The contrast asserted by the Supreme Court of Pennsylvania between Megan's Law and § 9712 rings as hollow as the comparison it draws between the Pennsylvania and the New Jersey Megan's Law statutes.

Having placed before this Honorable Court the initial factual clarifications in order to conduct further analysis of the pertinent issues, the Petitioner contends that the Supreme Court of Pennsylvania failed to apply the applicable case law and legal standards required under the Due Process Clause for the Fourteenth Amendment of the United States Constitution. As previously discussed, the Pennsylvania Supreme Court improperly relied upon

Verniero in finding Megan's Law unconstitutional.[1] In *Verniero* the Third Circuit explicitly stated that its decision was based upon the due process standards for civil proceedings developed in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and not those for criminal proceedings:

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[1] Petitioner is aware that the Pennsylvania Supreme Court also finds support for its *Williams*, decision in this Court's opinion in *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). In *Specht*, this Court held that the Colorado Sex Offenders Act was unconstitutional under the Due Process Clause because the statute did not provide a defendant with the right to be present at a hearing represented by counsel with the opportunity to present evidence and cross-examine witnesses when the trial court would determine if that defendant should receive an increased potential maximum sentence of life imprisonment if the court found the defendant to be a threat of bodily harm, a habitual offender or mentally ill. Pennsylvania's Megan's Law is far removed from the Colorado statute by specifically providing a defendant with a full panoply of procedural safeguards, including the right to a hearing before the trial court, the right to representation by counsel, the right to present evidence and testimony before the court, and the right to confront and cross-examine witnesses. The plain language of this statute, acknowledged by the Pennsylvania Supreme Court, reveals that the Pennsylvania statute does not violate the dictates of *Specht*. The Supreme Court of Pennsylvania, however, determined that Megan's Law does not comply with *Specht* and fails to provide any due process protections regardless of the procedural safeguards in the statute because of the rebutable presumption that a convicted defendant of an enumerated crime is a sexually violent predator. This conclusion that the presumption nullifies the procedural guarantees of the statute is an erroneous reading and application of *Specht* by the Pennsylvania Supreme Court. As with all the issues raised in this petition, this subject will be elaborately treated in the Petitioner's brief should the writ be granted by this Honorable Court.

> In reaching this conclusion, we have not been unmindful of the Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). In *McMillan*, a Pennsylvania sentencing statute set a mandatory minimum for those convicted of a crime while using a visible firearm. The issue there was whether a "sentencing consideration," such as the presence of a firearm, need be proven by more than a preponderance of evidence. The Court held, affirming a long tradition, that proof by a preponderance of evidence is sufficient in the sentencing context. Here, however, we are not dealing with sentencing. Sentencing occurs during and is part of the criminal proceeding; its purpose is to specify the sanction to be imposed as a result of one's conviction by proof beyond a reasonable doubt. A Megan's Law hearing, by contrast, is a civil proceeding that stands apart from the criminal proceedings in which one was convicted and sentenced. . . . Moreover, as we have discussed, the factual determinations required in a Megan's Law hearing are of greater complexity than those typically involved in sentencing. Accordingly, we conclude that it is entirely consistent with *McMillan* to require a higher standard of proof in a Megan's law proceeding.

Verniero, supra at 1111. *See also Halye, supra* at 773 (Ford Elliott, J., concurring and dissenting; quoting same from *Verniero*).

As noted previously, however, the New Jersey tier system reviewed in *Verniero* is unlike the Pennsylvania Megan's Law system because Pennsylvania's statute involves a criminal proceeding whereby sexually violent

predator designation is assigned following a hearing held "to specify the sanction to be imposed as a result of one's conviction by proof beyond a reasonable doubt." *Halye, supra* at 773 (Ford Elliott, J., concurring and dissenting). Furthermore, the Pennsylvania scheme requires factual determinations to be made by the trial court that mirror those typically involved in sentencing. These considerations were specifically lacking in the New Jersey statute before the Third Circuit in *Verniero,* thereby requiring the conclusion that civil due process standards must be followed in reviewing the New Jersey tier system. Therefore, *Verniero,* a case crucial to the holding in *Williams,* dictates that the Supreme Court of Pennsylvania applied the wrong legal standards in *Williams.*

The question then becomes what due process standards should the Pennsylvania Supreme Court have applied in *Williams.* The United States Supreme Court established the following standard for reviewing constitutional challenges under the Fourteenth Amendment Due Process Clause in the context of criminal law:

> In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly based on the recognition that, [b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990); *accord, United States v. Lovasco,* 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric

> of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967), "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Accord, Estelle v. McGuire*, 502 U.S. 62, 70, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Marshall v. Lonberger*, 459 U.S. 422, 438, n.6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). . . .
>
> . . .
>
> Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.' *Speiser v. Randall*, 357 U.S. 513, 523 [78 S.Ct. 1332, 2 L.Ed.2d 1460] (1958); *Leland v. Oregon*, 343 U.S. 790, 798 [72 S.Ct. 1002, 96 L.Ed.2d 1302] (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 [54 S.Ct. 330, 78 L.Ed. 674] (1934). *Patterson v. New York*, [432 U.S. 197, 201-02, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)].

Medina v. California, 505 U.S. 437, 443-45, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

The United States Supreme Court has followed this standard into the present day in upholding the constitutionality of statutes affecting the criminal process, so long as those statutes do not relieve the prosecution of its burden to establish each and every element of a crime beyond a reasonable doubt. Although the Petitioner has detailed the cases supporting this position in its thorough and extensive brief before the Pennsylvania appellate courts regarding this case, and will again brief with specificity and detail should this honorable Court grant this Petition, the Petitioner merely mentions those cases at the present time for the sake of brevity. *McMillan v. Pennsylvania, supra* (preponderance of evidence standard placed upon Commonwealth for establishing visible possession of firearm during commission of enumerated offenses, thereby invoking mandatory-minimum five year sentence, does not violate Due Process Clause of Fourteenth Amendment; visible possession of firearm was not an element of the enumerated crimes)[2]; *Almendarez-Torres v. United States, supra* (increase in maximum penalty

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[2] The Supreme Court of Pennsylvania mistakenly relies upon the legal rationale in its own opinion in *Commonwealth v. Wright*, 508 Pa. 25, 494 A.2d 354 (1985), *aff'd, McMillan v. Pennsylvania, supra*, rather than the *McMillan* decision for due process analysis. Although both decisions upheld the Pennsylvania mandatory minimum sentencing statute, the Pennsylvania Supreme Court arrived at its determination of constitutionality utilizing a due process analysis completely removed from the one conducted by this Court under due process standards applicable for criminal proceedings. By relying upon *Wright* for due process standards rather than *McMillan*, the Pennsylvania Supreme Court buttressed its misapplication of the *Verniero* case discussed by Petitioner in this petition.

allowed illegal aliens who re-enter the country following deportation for an aggravated felony does not violate Due Process Clause of Fifth Amendment; recidivism sentencing enhancement was not an element of the underlying crime); *Leland v. Oregon, supra* (requirement that defendant raising insanity defense must establish insanity beyond a reasonable doubt does not violate Due Process Clause of Fourteenth Amendment; placement of heightened burden of proof and burden of persuasion upon defendant did not relieve prosecution of its duty to establish the elements of the crime charged beyond a reasonable doubt); *Medina v. California, supra* (requirement that defendant must rebut a presumption of competency by a preponderance of the evidence does not violate Due Process Clause of Fourteenth Amendment; placement of burden upon defendant does not violate due process where defendant is afforded a reasonable opportunity to demonstrate his incompetency).

Applying this precedent to a due process analysis of Megan's Law establishes the conclusion that placing the burden of persuasion upon a defendant to rebut by clear and convincing evidence that the defendant is a sexually violent predator does not violate the Due Process Clause. The sexually violent predator designation only becomes relevant for sentencing purposes following the prosecution's ability to prove beyond a reasonable doubt the elements of the enumerated offense with which the defendant was charged. Because the presumption and its corresponding burden upon the defendant regarding sexually violent predator designation neither adds an additional element to the enumerated crimes, nor relieves the Commonwealth of its burden in proving all the elements

of the enumerated offenses beyond a reasonable doubt, Megan's law does not violate the Due Process Clause.[3]

Finally, Petitioner asserts that the *Williams* decision directly conflicts with the rationale behind the Superior Court of Pennsylvania's decision in *Commonwealth v. Davis*, 708 A.2d 565 (Pa.Super. 1997), causing the Constitution to be read and applied in a piecemeal fashion rather than as an organic whole. In *Davis*, the Superior Court addressed a challenge under the Double Jeopardy Clause to Megan's Law. The basis for the appellant's claim was that being found a sexually violent predator was a subsequent prosecution for a greater included offense following a conviction for the lesser included offense of an enumerated crime. The Superior Court rejected this challenge out of hand. The Superior Court specifically summarized the inherent flaws of the appellant's argument in the following manner:

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[3] Although the Supreme Court of Pennsylvania stated in *Williams* that the Commonwealth and the Attorney General relied upon *Commonwealth v. Wright, supra*, in support of the constitutionality of Megan's Law, Petitioner stresses as it has throughout the appellate process that it has consistently argued all of the applicable case law of this Honorable Court mentioned within this petition regardless of the other arguments put forth by other representatives of this Commonwealth. Furthermore, Petitioner contends that even with any potential omissions regarding the arguments put forth before the Pennsylvania Supreme Court in *Williams* must not excuse the base errors of constitutional law committed by the Supreme Court of Pennsylvania in conducting their due process analysis of Megan's Law.

Inherent in appellant's double jeopardy challenge is his assertion that the adjudicatory hearing to rebut the presumption he is a sexually violent predator is in fact, a trial. Appellant attempts to persuade this court of his opinion by twisting the language of Megan's Law. For instance, appellant argues that "in a proceeding to adjudicate petitioner as a Sexually Violent Predator, petitioner is entitled to receive a trial by jury, and to have the Commonwealth bear the burden of proof of 'beyond a reasonable doubt.' " Appellant's brief at 10. A careful reading of Megan's Law reveals that it does not require a proceeding to adjudicate a convict to be a sexually violent predator. Rather, as stated supra, it permits the courts to presume that the criminal is a sexually violent predator, but creates an opportunity whereby the convict may present testimony and evidence in an attempt to rebut the presumption. Further, a post-trial hearing is no more a "second trial" than a sentencing hearing or a hearing on post-trial motions. Appellant's trial (entry of guilty plea) rendered him a sexually violent predator; the hearing is offered to provide appellant the opportunity to overcome that presumption.

Finally, appellant's premise that the "sexually violent predator" constitutes a greater included offense of involuntary deviate sexual intercourse is flawed. The Commonwealth was not required to prove that appellant was a sexually violent predator in order to support its case against him for involuntary deviate sexual intercourse involving minors under the age of thirteen. Once again, Megan's Law permits the courts to presume that an individual who would

> commit such a heinous act against children is a sexually violent predator.

Id. at 120. Since the *Davis* decision, both the Superior Court in its *Halye* decision and the Pennsylvania Supreme Court in *Williams* contradicted the *Davis* holding. This lack of cohesiveness between these Pennsylvania appellate decisions has forced the Due Process Clause into direct and irreparable conflict with the Double Jeopardy Clause.

The essential harmony that must exist between the Due Process Clause and Double Jeopardy Clause in criminal proceedings is highlighted by this Honorable Court's decisions in *Almendarez-Torres* and *Monge v. California*. As previously discussed, *Almendarez-Torres* involved a due process challenge to recidivism sentencing enhancements. In a five to four decision, this Honorable Court held that the recidivism enhancement did not establish a new element to the underlying crime for the prosecution to prove beyond a reasonable doubt. In *Monge*, this Honorable Court reviewed a double jeopardy challenge to a recidivism-sentencing enhancement. In another five to four decision, this Honorable Court held that double jeopardy does not attach at the sentencing phase concerning a recidivism enhancement as the recidivism enhancements did not constitute an element of the underlying offenses with which the defendant was charged and convicted.

Crucial to each decision was whether the enhancement became an element of the underlying crime. This issue became so dominant in the minds of the *Monge* dissenters that Justice Antonin Scalia called into question

the *Almendarez-Torres* due process holding while discussing the double jeopardy question before this Court. *Monge*, at ___, 118 S.Ct. at 2256-57, 141 L.Ed.2d 615. As the majority and dissenting opinions show in *Almendarez-Torres* and *Monge*, the Constitution cannot be bifurcated in the manner conducted by the Pennsylvania appellate courts.

A further example of the difficulty that results when the Constitution is not considered in its entirety is revealed by comparing the Cruel and Unusual Punishment Clause to the Pennsylvania appellate courts' treatment of the Megan's Law sentencing enhancement under the Due Process Clause. In *Harmelin v. Michigan*, 510 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), this Honorable Court upheld a Michigan law requiring a life sentence without parole eligibility for anyone convicted of possessing more than 650 grams of cocaine. Writing for the majority, Justice Scalia emphasized that the history of the Eighth Amendment does not support the argument raised by the defendant against the sentencing statute:

> As our earlier discussion should make clear, this claim has no support in the text and history of the Eighth Amendment. Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States – both at the time of the founding and throughout the 19th century. There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is "mandatory."

Id. at 994-95, 111 S.Ct. 2680, 115 L.Ed.2d 836 (citations omitted).

Based upon the *Harmelin* ruling, a flat life sentence for the enumerated offenses without any further hearings would be constitutional under the Cruel and Unusual Punishment Clause, as well as remove any challenge based upon the sexually violent predator designation under the Due Process Clause. The Petitioner is utterly baffled, however, by the claims that the sentencing enhancement contained in Megan's Law becomes unconstitutional under the Due Process Clause solely because the Legislature enabled a defendant with a mechanism for mitigating the penalty, which is achieved by showing that they are not a sexually violent predator even though the nature of the crime is such that a designation as a sexually violent predator upon conviction for the crime would in and of itself be sufficient. Once again, the appellate courts of Pennsylvania have created a circumstance where one clause of the Constitution is in direct conflict with another. As Pennsylvania Supreme Court Justice Ronald D. Castille reveals in his dissenting opinion in *Williams*, not only are the fundamental norms of constitutional construction in dire straits within Pennsylvania, but also the inconsistency in constitutional application by the Pennsylvania appellate courts threatens to annihilate our citizenry's collective quality of mercy. Accordingly, the Petitioner urges this Honorable Court to grant this Petition for Writ of Certiorari, and vacate the holding of the Supreme Court of Pennsylvania that Megan's Law is unconstitutional.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that a *writ of certiorari* issue to review the decision below.

Respectfully submitted,

H. Stanley Rebert
District Attorney
Jonelle L. Harter
First Deputy District Attorney
Edward A. Paskey
Executive Deputy Prosecutor
Timothy J. Barker
Senior Deputy Prosecutor

York County District Attorney's Office
28 East Market Street
York, PA 17401
(717) 771-9600
DATE: October 28, 1999

APPENDIX

J. A07045/99

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSE LUIS COLLAZO, Appellant	:	No. 927 Harrisburg, 1998

Appeal from the Order Entered May 7, 1998, Docketed May 18, 1998, in the Court of Common Pleas of York County, Criminal Division, at No. 816 C.A. 1997.

(Filed Mar 23 1999)

BEFORE: EAKIN, JOYCE and HESTER, JJ.

MEMORANDUM:

Appellant entered a plea of *nolo contendere* to one count of indecent assault and one court of corruption of minors. The matters involved Appellant's conduct with his nine-year-old daughter.

Following a hearing conducted on September 12, 1997, the court made a determination that Appellant was a sexually violent predator within the meaning of 42 Pa.C.S.A. §§ 9791 to 9799.6, collectively known as Pennsylvania's version of Megan's Law.

Appellant was ordered to register with the state police to be photographed and fingerprinted and not to have contact with anyone under the age of eighteen. In addition, he was sentenced to five years probation.

Appellant has questioned the constitutionality of "Megan's Law." This Court, sitting *en banc* considered a similar fact situation in ***Commonwealth v. Halye,*** 719 A.2d 763, 769 (Pa.Super. 1988), and held:

> [W]e conclude that the due process clause of the federal constitution is violated by the provisions of the Act which requires the offender to rebut a presumption and which do not impose upon the prosecution the burden of persuasion by clear and convincing evidence. As a consequence, we strike as unconstitutional § 9794 of Title 42 and all remaining sections of the Act which refer to the designation of a "sexually violent predator." Accordingly, we reverse Appellant's conviction for endangering the welfare of children and we vacate the judgment of sentence on Appellant's remaining convictions and remand for resentencing absent application of the provisions of the Act.

Our adjudication is controlled by the foregoing *en banc* opinion.

Judgment of sentence reversed, and case remanded for resentencing. Jurisdiction relinquished.

J. A07045/99

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSE LUIS COLLAZO, Appellant	:	No. 927 Harrisburg, 1998

Appeal from the Order Entered May 7, 1998, Docketed May 18, 1998, in the Court of Common Pleas of York County, Criminal Division, at No. 816 C.A. 1997.

JUDGMENT

ON CONSIDERATION WHEREOF, *it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of* York *County be, and the same is hereby* Reversed; Remanded; Jurisdiction Relinquished.

BY THE COURT:

/s/ _____
PROTHONOTARY

Dated: March 23, 1999

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 0404 M.D. 1999 Alloc. Dkt.
Petitioner	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
JOSE LUIS COLLAZO,	:	
Respondent	:	

ORDER

PER CURIAM:

AND NOW, this 30th day of July, 1999, we **DENY** the Petition for Allowance of Appeal. *See, Commonwealth v. Williams*, 84 W.D. Appeal Docket 1997, 1999 WL 441873 (Pa.).

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**NO. 816 C.A. 1997**
	:	**Indecent Assault**
v.	:	**Corruption of Minors**
	:	
JOSE COLLAZO	:	

APPEARANCES:

HEATHER A. MOYER, ESQUIRE
Senior Deputy Prosecutor
for the Commonwealth

JOANNE TYLER FLOYD, ESQUIRE
for the Defendant

1925(a) OPINION and ORDER

The Defendant, Jose Collazo, was charged by Criminal Information with one (1) count of Indecent Assault[1] and one (1) count of Corruption of Minors.[2] The Defendant pleaded nolo contendere to both counts on July 9, 1997. The Sexual Offender Assessment Board conducted a Sexual Offender Risk Assessment and a Hearing was held before the Honorable John C. Uhler, President Judge on September 12, 1997. Following the Hearing the Court found the Defendant to be a sexually violent predator. (Sept. 12, 1997, Tr. at 15). The Defendant was then sentenced pursuant to a plea agreement on September 12, 1997, to five (5) years probation on the count of Indecent Assault and three (3) years probation on the count of

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[1] 18 Pa.C.S. § 3126(a).

[2] 18 Pa.C.S. § 6301(a)(1).

Corruption of Minors to run concurrent. The life provisions of Megan's Law were discussed but not made a part of the sentence.

On October 10, 1997, the Court received a Notice of Appeal that the Defendant had appealed the Order of Court entered in this matter on September 12, 1997, to the Superior Court of Pennsylvania.[3] Upon receipt of the Notice of Appeal, the Court entered an order pursuant to Pa.R.A.P. 1925(b) directing the defendant to forthwith file of record and serve on the trial judge a concise statement of the matters complained of on appeal. The Defendant filed a Statement of Matters Complained Of with the Court on October 28, 1997. The Court filed of record a 1925(a) Opinion and Order.

The Superior Court, by order dated March 12, 1998, remanded the case for an evidentiary hearing on the claims of ineffectiveness of counsel and authorized the Defendant to file post-trial motions with the trial court nunc pro tunc. The court scheduled an evidentiary hearing for April 2, 1998. At the evidentiary hearing on April 2, 1998, the Commonwealth conceded that trial counsel had been ineffective for not filing post-trial motions. Post-trial motions were filed nunc pro tunc by the Defendant challenging the constitutionality of Pennsylvania's Megan's Law, 42 Pa.C.S. § 9791 *et seq.*, and were denied by the Court by opinion and order entered on May 7,

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[3] Although the Court subsequently recognized that the sentence imposed regrettably did not conform with the mandatory sentencing provision found in 42 Pa.C.S. § 9799.4(a), we were without jurisdiction to correct the sentence *sua sponte* as an appeal to the Superior Court had already been taken.

1998. The Defendant now appeals this Court's ruling that Megan's Law is constitutional to the Superior Court.

This Court has previously addressed the constitutionality of the provisions of Megan's Law in *Commonwealth v. Ames*, 471 C.A. 1997 (York 1997), and *Commonwealth v. Stough*, 1302 C.A. 1997 (York, 1997),[4] and the opinion entered of record in the above-captioned case on May 7, 1998. The previously entered opinions adequately set forth the reasons for the order denying the Defendant's post-trial motions filed nunc pro tunc and, therefore, we rely upon our prior reasoning as set forth in the previously filed opinions.

It should be noted that the Defendant did not present any evidence at the sentencing hearing on September 12, 1997, to rebut the statutory presumption that he is a sexually violent predator. The Defendant's assertion that the sexually violent predator provisions were erroneously applied by the Court in sentencing the Defendant is, therefore, without merit. The Court is constrained by the statutory provisions to find the Defendant to be a sexually violent predator where the Defendant does not rebut the presumption by clear and convincing evidence.

The Clerk of Courts is directed to provide notice of the entry of this Rule 1925(a) Opinion and Order as it is required by law.

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[4] The opinions previously entered by the Court in *Ames* and *Stough* are appended to this opinion for reference.

BY THE COURT,

/s/ John C. Uhler
JOHN C. UHLER,
PRESIDENT JUDGE

DATE: June 18, 1998

IN THE COURT OF COMMON PLEAS OF
YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 816 C.A. 1997
	:	Indecent Assault
v.	:	Corruption of Minors
	:	
JOSE COLLAZO	:	

APPEARANCES:

HEATHER A. MOYER, ESQUIRE
Senior Deputy Prosecutor
for the Commonwealth

JOANNE TYLER FLOYD, ESQUIRE
for the Defendant

OPINION

The Court has before it the Post-Trial Motions Nunc Pro Tunc filed in the above-captioned matter by the Defendant, Jose Collazo. The Defendant, in his motions, has raised a challenge to the constitutionality of Pennsylvania's version of what is known colloquially as Megan's Law, 42 Pa.C.S. § 9791 *et seq.* After careful review of this Court's prior decisions, relevant case law and the entire record before the Court we hereby deny the Defendant's Post-Trial Motions.

The defendant was charged by Criminal Information with one (1) count of Indecent Assault[1] and one (1) count of Corruption of Minors.[2] The Defendant pleaded nolo contendere to both counts on July 9, 1997. The Sexual

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[1] 18 Pa.C.S § 3126(a).

[2] 18 Pa.C.S. § 6301(a)(1).

Offender Assessment Board conducted a Sexual Offender Risk Assessment and on September 12, 1997, this Court found the Defendant to be a sexually violent predator. The Defendant was then sentenced pursuant to a plea agreement on September 12, 1997, to five (5) years probation on the count of Indecent Assault and three (3) years probation on the count of Corruption of Minors to run concurrent. The life provisions of Megan's Law were referenced as to the registration requirements.

On October 10, 1997, the Court received a Notice of Appeal that the Defendant had appealed the Order of Court entered in this matter on September 12, 1997, to the Superior Court of Pennsylvania.[3] The Pennsylvania Superior Court entered an order on March 12, 1998, remanding the case for an evidentiary hearing to determine whether trial counsel was ineffective. The Superior Court permitted the Defendant to file post-trial motions with the trial court nunc pro tunc. At the evidentiary hearing on April 2, 1998, the Commonwealth conceded that trial counsel had been ineffective for not filing post-trial motions. The Defendant now challenges the constitutionality of Pennsylvania's Megan's Law, 42 Pa.C.S. § 9791 *et seq.*

Our inquiry necessarily begins with the recognition that "[d]uly enacted legislation carries with it a strong presumption of constitutionality [that] . . . will not be overcome unless the legislation is clearly, palpably and

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[3] Although the Court subsequently recognized that the sentence imposed regrettably did not conform with the mandatory sentencing provision found in 42 Pa.C.S. § 9799.4(a), we were without jurisdiction to correct the sentence *sua sponte* as an appeal to the Superior Court had already been taken.

plainly in violation of the constitution." *Commonwealth v. Swineheart*, 541 Pa. 500, 508, 664 A.2d 957, 961 (1995) (citations omitted). This Court, in *Commonwealth v. Ames*, 471 C.A. 1997, and *Commonwealth v. Stough*, 1302 C.A. 1997, has previously held the statutory provisions of Megan's Law to be constitutional. We are not convinced that the Defendant has now demonstrated to the Court that the legislation is "clearly, palpably and plainly" violative of the constitution.

As we previously stated in *Commonwealth v. Stough*, 1302 C.A. 1997, conviction of a predicate sexual offense specified in 42 Pa.C.S. § 9793(b) results in the mandatory imposition by the trial court of a maximum sentence of life imprisonment pursuant to 42 Pa.C.S. § 9799.4(a), the registration requirements of 42 Pa.C.S. § 9795(a) and the notification requirements of 42 Pa.C.S. §§ 9797 and 9798, unless the defendant rebuts the legislatively imposed presumption that he is a sexually violent predator. The defendant is afforded the opportunity to rebut the presumption by clear and convincing evidence at a hearing held prior to sentencing as required by 42 Pa.C.S. § 9794(e).

The Pennsylvania Superior Court, in *Commonwealth v. Davis*, 1998 WL 35176 (Pa.Super. 1998), stated in dicta[4] that it is the defendant's conviction of a predicate sexual

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[4] The Superior Court, in *Davis*, held that the hearing held prior to sentencing pursuant to 42 Pa.C.S. § 9794(e) was not a second trial but, the court specifically did not address the constitutionality of the statutory presumption that a defendant convicted of a predicate sexual offense is presumed to be a sexually violent predator.

offense that renders him a sexually violent predator and that the hearing held prior to sentencing does not itself impose a greater punishment on the defendant. *Davis,* at ___. Rather, the Superior Court stated that "the hearing is offered to provide appellant the opportunity to overcome that presumption." *Davis,* at ___. The Superior Court concluded that "if at the hearing appellant cannot rebut the presumption that he is a sexually violent predator, then he will be subject to the maximum sentencing provisions provided for at 42 Pa.C.S. § 9799.4.". *Davis,* at ___. Although the Superior Court did not address the constitutionality of the statutory presumption in *Davis,* the court did recognize in dicta that conviction of a predicate offense necessitates the imposition of a mandatory maximum sentence and further registration and notification requirements. However, the Superior Court also recognized that the defendant is afforded the opportunity to reduce the maximum sentence by presenting clear and convincing evidence that he is not a sexually violent predator, thereby rebutting the statutory presumption. In light of the foregoing, we are not convinced that the statutory presumption "clearly, palpably and plainly" violates the constitution and, therefore, we deny the Defendant's Post-Trial Motions.

Accordingly, the following order shall be entered.

BY THE COURT,

/s/ John C. Uhler
JOHN C. UHLER,
PRESIDENT JUDGE

DATE: May 7, 1998

JCU/jms

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**NO. 816 C.A. 1997**
	:	**Indecent Assault**
v.	:	**Corruption of Minors**
	:	
JOSE COLLAZO	:	

APPEARANCES:

HEATHER A. MOYER, ESQUIRE
Senior Deputy Prosecutor
for the Commonwealth

JOANNE TYLER FLOYD, ESQUIRE
for the Defendant

ORDER

AND NOW, this 7th day of May, 1998, upon consideration of the Post-Trial Motions Nunc Pro Tunc filed in the above-captioned matter by the Defendant, Jose Collazo, we hold that the statutory provisions of Megan's Law, 42 Pa.C.S. § 9791 *et seq.*, are constitutional and hereby order that the motions are denied.

BY THE COURT,

/s/ John C. Uhler
JOHN C. UHLER,
PRESIDENT JUDGE

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY,
PENNSYLVANIA

COMMONWEALTH	:	No. 816 C. A. 1997
VS	:	1-Indecent Assault
JOSE COLLAZO	:	2-Corruption of Minors

York, Pa., Wednesday, July 9, 1997

Before the Honorable John C. Uhler, President Judge

APPEARANCES:

HEATHER A. MOYER, Esquire
Assistant District Attorney
For the Commonwealth

JOHN J. MORAN, II, Esquire
For the Defendant

* * *

ORDER

In the above referenced matter, the Court having reviewed both the written guilty plea colloquy form as well as verbally discussed the ramifications of the nolo contendere or no contest plea, we are satisfied that the proposed plea entered by Jose Collazo is his knowing, intelligent, and voluntary action.

We note that the plea is subject to a plea agreement which provides that the Defendant be sentenced to some length of probationary supervision, that to be determined by the Probation Department, and also this is a Megan's

Law case which would be referenced to the Sexual Offender Advisory Review Board.

We have, by reason of the further advises, that the victim, who is of a tender age, is undergoing significant trauma and continuing psychological intervention.

It is the request of the victim, the victim's mother, the Commonwealth, and the police officer that the Court consider the within proposal which falls within the guidelines of the sentencing commission; the Defendant being a first offender under these circumstances, and those guidelines being restorative sanctions to six months incarceration.

We note further than given these circumstances and the recital made by the Commonwealth, we find the elements are present for the Court to find the Defendant guilty of the charge of indecent assault, a misdemeanor of the first degree, and corruption of minors, a misdemeanor of the first degree under the Crimes Code.

We will request a presentence investigation. We request that that presentence investigation be provided within 45 days of this date.

We further note that by virtue of the past experience with the Sexual Advisory Review Board we will schedule the sentencing in this matter for September 8th, 1997 at 8:30 a.m.

The scheduling of this sentence at that date and that time is not to minimize the Board's obligation under the statutory scheme to provide the report within 30 days; however, that has not been something that has been forthcoming as a result of the Court's experience.

We further note that the Clerk of Courts shall fax forthwith the notification that an evaluation need be made as to whether or not the Defendant represents a sexually violent predator to trigger an expanded life-long registration requirement.

We note further that upon completion of the presentence report by the Probation Department they shall forthwith provide a copy to Attorney Moran as well as to Attorney Moyer of the District Attorney's Office so that any issues that arise therefrom may be promptly dealt with.

* * *

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY,
PENNSYLVANIA

COMMONWEALTH	:	No. 816 C. A. 1997
VS	:	1)Indecent Assault
JOSE COLLAZO	:	2)Corruption of Minors

York, Pa., Friday, September 12, 1997

Before the Honorable John C. Uhler, President Judge

APPEARANCES:

HEATHER A. MOYER, Esquire
Assistant District Attorney
For the Commonwealth

JOHN J. MORAN, II, Esquire
For the Defendant

* * *

SENTENCE

ATTORNEY MOYER: Your Honor, we can proceed with Jose Collazo.

Your Honor, this is Commonwealth v. Jose L. Collazo, 816 Criminal Action 1997. The charges are indecent assault and corruption of minors.

If you'll recall, Your Honor, the Defendant originally pled no contest on July 9th, 1997.

We had some issues previously this week regarding the Defendant's plea, perhaps being withdrawn or not.

You stated that today's date you would determine whether you were going to reinstate the plea and then also proceed with sentencing. I have spoken with –

THE COURT: Could I have my criminal file that has the cases and stuff? Do you know what I'm talking about?

ATTORNEY MOYER: Your Honor, I have spoken with the victim's mother in this case, and it is still her desire to proceed with the no contest plea and the agreement as we had stated before.

She is present in the courtroom and does wish to make some statements prior to sentencing. Otherwise, we have to proceed with the Megan's Law hearing as well.

THE COURT: I think both counsel have had an opportunity to review the reports generated by the evaluators on behalf of the sexual offender board.

Counsel are entitled to make any comments you wish or provide any other testimony you wish to put forth with regard to the issue before the Court.

ATTORNEY MORAN: Judge, this is a case of first impression for me, so I know the Court's been through this – through several of these.

Is the order that we want to do this is I comment on the reports and then –

THE COURT: I don't – I'm not tied into any particular order.

There's a presumption given the nature of the offense that your client is a dangerous sexual offender predator, and we start off with that presumption.

The statute defines the issues, the elements that this Court must consider, and I'll entertain any advices you wish to present that you think that might affect overcoming that presumption, and you can also comment on the records.

ATTORNEY MORAN: Well, Judge –

THE COURT: Before getting – get your thoughts together, and I'm missing a document here.

* * *

(Recess)

* * *

THE COURT: You may continue.

ATTORNEY MORAN: Your Honor, as I had indicated to you, this is a case of first impression for me, and I look at the statute and see that the – of course, what you had indicated earlier that the presumptions all change after the plea is in place, and I agree with the Court that's what the statute requires the Court to do.

Then, of course, refers to the board, and the board has two psychiatrists, psychologists, whomever they think are qualified, and in this case it was Dr. Arndt and Dr. O'Keefe. Dr. O'Keefe seems to think Mr. Collazo is not a sexually violent predator, so I'll concentrate on Dr. Arndt's report.

I would argue, Judge, or it seems apparent that you're the tie breaker in this -- in this case. You are the tie breaker; there being a split between the two experts.

And, I might point out, of course, that the two experts, when they made their observations of Mr. Collazo, were also required to presume that he was a predator prior to their even asking him the first question.

Nevertheless, Dr. O'Keefe comes down the side of him not being a predator, so, going through the 9794 Subsection C, and then the ten listed criteria that the Court is to consider, a couple of them don't mean much, at least not by my view; that is, would be the age of the offender: He's 44. The record is clear that that's the case.

Offender's prior criminal record: And, as well as other offenses – and I would argue that there is no prior record that the Court should consider.

There was a 1981 homicide. He was found not guilty of that, and I think that the Court will be required to give that no weight because of his acquittal in that case.

There's an alleged assault against the wife. The record is unclear as to the underlying circumstances with that assault.

It appears, however, that that was reduced – there was a summary conviction in that case, and I would suggest to the Court that's something shouldn't have very much weight when considering Mr. Collazo's prior criminal record.

As we know, there are various reasons that people plead to summary offenses. It may be convenience or what, but I would suggest that shouldn't have much weight to the Court.

It appears that Dr. Arndt in his report mentions the homicide at least twice in his report, on page 3, the

second full paragraph and on page 4 of the very last – beginning of the last sentence, he says there is ample evidence from the record that Mr. Collazo has impulse problems and periods of rage.

I would suggest, Your Honor, that's to the contrary. I would suggest that he being 44 years old and absent anything on the record is, in fact, a peaceful person, but that may be stretching what's on the record a little bit in his favor.

But, nevertheless, he has no past criminal record, and that's my position.

Age of the victim: She's now twelve. She was nine.

The victim gave statements to health care workers at the hospital and four months later gave statements to the police – I believe to the police, to Dana Ward. The record has some statements from the child's mother which seem to be more damning against Mr. Collazo than the child's statement to the health care workers.

If we were to take that as the allegations of wrongdoing, they are minor in comparison to what is – was later given to the police upon interrogation of the child, and perhaps that's why the offense charged was indecent assault and nothing more.

I'll get back – I hope to get back to that in a couple minutes.

There appears to be no use of illegal drugs in this case. That's one of the criteria called for in subparagraph 5.

It appears to be – that Mr. Collazo did not complete any prior sentence or participate in – as a sexual offender in any other program.

Moving onto paragraph 7, dealing with mental illness or mental disability, the record is clear that Mr. Collazo has some mental problems. Depression is one; personality disorder another, and some other medical terms that leave me at a loss a little bit, but he does have some problems, and that seems to be clear from both Dr. O'Keefe and Dr. Arndt's report.

Getting back to the nature of the contact with the victim, I may have been a little ahead of myself when I mentioned the report that was given by the child to the health care workers, so I'll move on.

The last paragraph, 9, does the crime include any unusual cruelty, and I would suggest that the record indicates absolutely not. There are no threats of violence that have been related to the Court against the child; I suppose no threats of violence against the mother even, and I don't know why that would be germane, but certainly none on the record concerning threats to the child.

And, the behavioral characteristics: That may be redundant in that we have a diagnosis of depression, personality disorder.

So, I would suggest, Judge, that since this case falls into – is not a felony charge, by the way, but is a misdemeanor charge as set forth, it seems specially in the statute it is set forth that they just include that, it being a misdemeanor charge, that the least serious of all of the

charges that make this – that make Megan's Law applicable, that the Court should consider that, should consider all the things I said naturally.

I hope the Court will pay some attention to me and the fact that – that Dr. Arndt's report to me seems to be based on some erroneous presumptions on his part, and that, of course, will be the – him taking into consideration this child's – this unfortunate death in 1981 of one of Mr. Collazo's children – no, it wasn't his child, I'm sorry.

I could put Mr. Collazo under oath, Your Honor, and have him testify to you what was said at trial. I realize that would be hearsay, but it would be something on the record, if I may, to just say a few words to that.

In that case, as I understand it, this is not in the record, of course, the mother of the child made an admission that she was the one who injured the child.

So, having said all that, Your Honor, it appears that you are the tie breaker in the case. I realize that you are laboring under the same presumption –

THE COURT: The statute.

ATTORNEY MORAN: – the statute requires you to do, but I would think that you have at your disposal the same information that Dr. O'Keefe had, and he seemed to get over – hurdle that by saying he didn't think Mr. Collazo was a predator.

I would hope that you would – would agree with me in my review of the criteria required by the Court under 9794 Subsection C, and then ten subparagraphs, agree that there's a problem that Mr. Collazo has.

He doesn't seem to be accepting guilt, and, of course, he's entered a no contest plea in this. He's maintained he didn't do anything, and I believe that that may have some impact on – just my reading both reports that –

THE COURT: Well, if he's maintaining that he did not do anything, is he maintaining that the Commonwealth cannot prove its case?

ATTORNEY MORAN: No, he's not maintaining that.

It is sort of an unusual situation for the Court to be put in with a no contest plea, but he does admit readily that the – they could prove the case against him, and I think he's done so on at least two occasions in front of the Court before.

It is kind of difficult for him to maintain that position and then tell – tell both psychiatrists that he did it and accepts blame. If he says he didn't do it, well, it's all consistent.

There's one more thing I had on my mind – that's all I have, Your Honor.

THE COURT: Mr. Collazo, would you like to say anything?

THE DEFENDANT: I didn't hear.

THE COURT: Would you like to say anything?

THE DEFENDANT: I repeat my words, I – I submit under the – the authority of the Court.

It's hard for me to address the problems that I have with my wife and the problem that she raised about my

kids. I explained to you, sir, the reason why I – and I believe you asked me if I understood what was my plea.

THE COURT: Um-hum.

THE DEFENDANT: I don't want to put the burden on my children, and I think about – I'm about to – I think – as far as I can – can take it.

I haven't seen my kids over eight month, and I believe they want to see me.

The problems that we have, their mother and I, I don't think that they should push it into that, and right now I think they are.

I don't think – I don't have no hearsay to them. I don't even – can see them. The Children and Youth Services send me a letter indicating that they – they will allow me to see.

THE COURT: On a supervised basis, correct?

THE DEFENDANT: Yes, Your Honor, but it turned out to be a question and we'll see.

THE COURT: Turned out to be a what?

THE DEFENDANT: An interview, and from there they will see if I am – I will be allowed to see them, and I was prepared to see them, and they asked me if I have – if I can give any information as far as medically, and I – I don't have no objection whatsoever, but they start getting to personal things, and I couldn't take the interview.

I was prepared to see my – my kids and I decided to decline the – I wasn't. – I was not in a position to have an interview. I was there to see my kids.

THE COURT: But, don't you understand that completion of getting all the necessary information as to what they were seeking was a – an entree into developing that visitation. By your unilateral position you couldn't continue, you're shooting yourself in the foot so to speak. Don't you understand that?

THE DEFENDANT: A lot of – a lot of thought came to my mind, and I wanted to see them, and I couldn't control myself.

I just – I was there thinking how to approach them and how to talk to them after eight month. I have a great deal of trouble, and when she relate to me that – that I have to answer several questions, that that was not for visitation, I just – I couldn't stand the interview, Your Honor. I try.

THE COURT: Anything else that you'd like to say?

ATTORNEY MORAN: I think I've gone over pretty much what I had to say.

THE COURT: Prosecutor, what would you like to throw into this mix?

ATTORNEY MOYER: Your Honor, I just have a few comments regarding Megan's Law.

Obviously, there's the presumption – and while this is considered the least serious offense, being a misdemeanor, out of the offenses that Megan's Law apply to, it

still is an offense that Megan's Law applies to, and it nevertheless is serious in my eyes.

While things have to be taken into consideration are that while the Defendant has no prior criminal record, you did read in the reports that there are previous child abuse indicators.

There were previous involvements with Children and Youth Services with child sexual abuse on the part of the Defendant, and those were indicated reports that we could not prosecute since the children were too young.

Again, there was a pattern of abuse. The testimony was that – or would have been at trial and as I offered during the no contest plea was that this continued for a period of time. It was not just one situation, one date that the Defendant did this to the victim.

Also, defense counsel referred to that there was no unusual cruelty, and I would offer that any of these –

THE COURT: I don't need to belabor that. I consider – I consider offenses of this nature by definition to have cruelty involved from the vantage point that an individual who is in a position of empowerment vis-a-vis the child, putting a child – literally having a child's youth arrested from them per se is cruelty in my mind, so that I don't need to have that belabored. Let's proceed.

ATTORNEY MOYER: Your Honor, other – other characteristics that you should look at in my eyes are things that Dr. Arndt and Dr. O'Keefe listed in both of their reports.

There are definitely some extreme depression issues, impulse control problems, and both doctors agreed that

this Defendant needs extensive psychiatric treatment, and after reviewing Dr. O'Keefe's report, when he finally said he did not believe there was sufficient evidence to find that he was a sexually violent predator, he still was relying on other characteristics that I thought were kind of inconsistent with that recommendation.

He did state that the Defendant does have a personality disorder and he was at risk for sexually abusing female children.

THE COURT: Let me say that both reports had a lot of conclusory language that went both ways and seemed inconsistent with one another. That's with regard to Dr. Arndt as well as with regard to Dr. O'Keefe.

ATTORNEY MOYER: O'Keefe.

ATTORNEY MORAN: O'Keefe.

THE COURT: And when I'm saying the cruelty, that's the Court's attitude. With regard – I'm not sure that's the statutory interpretation that was contemplated by the legislature, but I consider these offenses very serious, notwithstanding that this may be the lesser of those under the statutory code.

ATTORNEY MOYER: Your Honor, I believe that's everything that I have to add regarding the actual Megan's Law determination.

I would add that a provision of the Defendant's sentence should be no unsupervised contact with children under 18. That's not mentioned in the actual presentence investigation report.

Also, the reason that the pre-sentence investigation report, the recommendation there is separated in the way that it is is because of the new guidelines, and I have not had the opportunity to master the new guidelines yet, but the probation department did contact me and stated that the reason why they requested that sentence of three years for the corruption of minors and then the five years concurrent to the corruption of minors was because of the new sentencing guidelines and the applications of those guidelines, so I am in agreement with that portion of the recommendation.

And, as you know, the victim's mother is present. She does wish to address the Court.

THE COURT: Mr. Moran, do you have any comments with regard to the recommendation?

ATTORNEY MORAN: Not really.

I think we've got a plea arrangement in the case. I'm satisfied the Court will honor that. but I would like to comment, Judge, in reading both of the reports and my familiarity with the Defendant, I did think that a lot of – a lot of the observations by both Dr. Arndt and Dr. O'Keefe seemed to me to be consistent with what I know about him even though they're going in opposite directions.

THE COURT: Ma'am, what would you like to tell me?

ATTORNEY MOYER: State your name for the record.

MS. WENDY COLLAZO: Wendy Collazo.

ATTORNEY MOYER: And how are you related to the victim in this case?

MS. WENDY COLLAZO: Her mother.

ATTORNEY MOYER: And what would you like to say?

ATTORNEY MORAN: Your Honor, before we start, does this go to sentencing, or does this go to –

THE COURT: This goes to sentencing.

ATTORNEY MORAN: To sentencing.

THE COURT: Let me say that victims, guardians of victims in assaultive-type offenses have an opportunity and indeed a statutory right to make statements to the Court.

I understand that there is a plea agreement for a probationary sentence. I understand from the representation of the Commonwealth that the mother of the child on behalf of the child is agreeable to that sentence, but I'm also a firm believer that there is a benefit that is facilitated by having victims feel that they are a part of the process, that they have a voice, albeit a voice that understands that there's been an agreement, but then on the other hand, it helps to further explain and perhaps some day sink in the victimization that has taken place. So, with that in mind, go to it.

ATTORNEY MORAN: Just one more question.

But, is this the type of thing – the type of testimony that you will receive to make a decision as to whether Megan's Law applies?

THE COURT: No.

ATTORNEY MORAN: Because I would say –

THE COURT: I'm basing – I've taken the position, I have a handle on this case based upon what I've heard the representations made by the prosecutor.

I've read the reports. I've assimilated the reports. I have – I have listened to your client and based – and I've listened to you, and I'll make a determination independent of what is said with regard to – by Miss Collazo unless the Commonwealth wants to offer that as grounds for it.

I don't think that's the purpose of what this is being proffered.

ATTORNEY MORAN: Because my hands would have been tied.

THE COURT: No. If you feel your hands are tied, I'll be happy to expose Miss Collazo to cross examination.

ATTORNEY MORAN: I don't think that's needed after what I've just heard you say. Let's sit down.

MS. WENDY COLLAZO: Your Honor, I am asking the Court to please make sure that Jose is required to get counseling for sexual abuse of children.

Our family has been devastated by what has happened. We have all needed counseling, and I have been left to pick up all the pieces, and it has not been easy. We just want it to be over, and I wanted to know if I could say just a few words to him.

THE COURT: Yes.

MS. WENDY COLLAZO: Jose, I'm here today to let you know how you have affected our family. You have left us with broken hearts, broken dreams, and a broken family.

When you chose to sexually abuse our daughter, you chose to end our marriage and our family. This is not my doing, but yours. I loved you, but that is over now.

I feel sorry that you are lacking God's forgiveness in your life by not being able to admit what you have done. In the eyes of the Court, you have been found guilty. You have lost, and you have lost a lot. You have lost a wife and three beautiful daughters.

I do not hate you, but I pray for you. I pray that you can get the help you need. I also ask that you do respond to Children and Youth. Your youngest daughter especially does want to see you because she doesn't understand.

The girls do pray for you every night, and I am asking you today to please sign the divorce papers because our marriage is over. You need to face the fact that it is over.

I have the paper here with me today for you to sign, and I ask again that you please sign it so that you can go on with your life and get the help that you need and we can go on with ours.

THE COURT: Anything further?

ATTORNEY MORAN: No, Your Honor.

THE COURT: This is the time set by the Court as modified for the convenience of the parties for sentencing in the above-referenced Criminal Action.

The Defendant has entered a no contest plea to the indecent assault charge, which is a misdemeanor of the first degree under the Crimes Code.

We note that the Court by virtue of a statement memorialized by Dr. Arndt in its report was extraordinarily tempted on its own right to direct a withdrawal of the guilty plea, a no contest plea which has the same effect as a guilty plea and direct the Defendant proceed to trial.

We note that the Court as a backdrop of this conducted a hearing with all parties represented, and Mr. Collazo backtracked from the statement that was made allegedly to Dr. Arndt and indicated that Dr. Arndt misunderstood him, that for purposes of accountability under the criminal code, he was standing by his plea.

Furthermore, Mr. Collazo indicated to the Court that the no contest plea was entered in keeping with his best interests as well as the interests of his family, which he articulated.

The Court further noted that notwithstanding those purposes, of course, his acknowledgment in that fashion mandates the Court to find him guilty of the offense as charged.

The indecent assault charge, as has been described by the Commonwealth notwithstanding its gradation under the code is a very serious one and qualifies for referral to the Sexual Offender Review Board.

We note that that referral has been made and the Court has been the recipient of two different reports; one from Dr. Arndt that reaches the conclusion that the Defendant is a dangerous sexual predator within the meaning of Megan's Law.

Dr. Arndt in his concluding paragraph resolves that he believes the Defendant suffers from a severe major psychiatric disorder and is in great pain; concludes that it is not only from his pedophilia, but from a major affective disorder.

We note that the references to the prior homicide charge, this Court does not take into consideration within the confines of the report inasmuch as the Defendant was acquitted of those charges.

We note that on the flip side, Dr. O'Keefe, a clinical psychologist, has made specific diagnostic impressions, including major depression, dependent personality disorder, and multiple medical problems, and in his conclusion of personality assessment, and I'm quoting, discerned that Mr. Collazo has a personality disorder that causes him to be a risk for sexually abusing female children, quote, end quote, and under dangerousness as a sexual offender, quote, he should be considered a high risk for continued abusive behaviors, end quote.

The doctor then concludes in his final paragraph, certainly this individual is a risk to the community. Mr. Collazo does require a period of incarceration with sexual offender treatment during his length of stay in prison. Without treatment, he should be considered a poor risk for a probation sentence at this time. It is concluded that based on the assessment criteria established under the

Act, I do not find the Defendant to be a sexually violent predator.

We note the presumption under the Act requires the Court to evaluate the record before it and determine whether or not the record tips the scale to have the Court conclude otherwise.

We note the age of the Defendant. We note the prior criminal history or lack thereof and, including this offense and a description therein contained, the age of the victims, being the Defendant's daughter.

We note that there does not appear to be any illegal drug usage. There does not appear to be any indication that the Defendant has been involved with any prior programs for sexual offenders.

There is a clear recognition by both Dr. Arndt and Dr. O'Keefe that there are sufficient mental health issues; that likewise we perceive based upon the Defendant's responses, demeanor to the Court, and otherwise from a layperson, we cannot dispute that finding.

We note that there appeared to be, per the advices of the Commonwealth, the description of the offense, multiple instances that had occurred.

By definition, as one would statutorily understand cruelty, there was not such, but we note the Court's recognition that an individual who is in a position of empowerment and imposing that position and empowerment over youthful victims indeed precipitates a subtle cruelty, albeit not the physical cruelty that is undoubtedly contemplated by the Act.

The behavioral characteristics that contribute to the offender's conduct again we relate back to the mental health issues that have been articulated.

Given the circumstances presented to the Court and the presumption that is mandated by the legislative fiat, that an offender convicted of any offense set forth in this section shall be presumed to be a sexually violent predator, and that this presumption may be rebutted by the offender by clear and convincing evidence, we do not find clear and convincing evidence overcoming the issue and the presumption herein, particularly out of concern to the mental health issues that have been identified, verbalized and demonstrated.

Accordingly, we find the Defendant at this time to be a sexually violent predator.

We advise the Defendant on the record, and this should be affirmed by a form to be prepared by the Commonwealth to be acknowledged by the Defendant at the conclusion of this proceeding, that he has a duty to register and obtain the information required for each registration; that you have a duty to inform the Pennsylvania State Police within ten days if you change your residence; that you have a duty to register with any new law enforcement agency if you move to another state no later than ten days after establishing that residence.

You are further directed to report to the Pennsylvania State Police headquarters within five days of this date for photography and fingerprints upon this sentencing.

The Commonwealth will provide a form which reflects your duty to register under this subchapter acknowledging that it has been explained to you.

We note that the Court in open court has provided that explanation. Do you understand, sir, what your duties are?

THE DEFENDANT: To what?

THE COURT: To notify the state place where you live and so forth, what I just told you.

THE DEFENDANT: Yes, Your Honor.

THE COURT: I should further advise that with regard to failure to fulfill that requirement, that indeed in and of its own right is a felony of the third degree and a separate criminal offense, so it's very important that you follow through with that. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I must further advise you that this is not a – a designation that cannot be reviewed, meaning it can be reviewed and can be reviewed on a five-year period, which would be about the conclusion of your probationary period in this instance.

You can request by petition the Court to review that determination. Otherwise, absent Court overturning the designation, this is a – an obligation that you will have for life, do you understand that?

Do you understand what I just said?

THE DEFENDANT: Yes, Your Honor.

ATTORNEY MOYER: Your Honor, if I could add something with the sexually violent predator status, he would be on probation for life then.

THE COURT: He is on probation for life, but the Court can overturn that.

ATTORNEY MOYER: I understand that, but you said at the end of your five-year term of probation. I wanted to make sure it's clear that –

THE COURT: He has the right to seek the Court to overturn the designation.

ATTORNEY MOYER: Correct, correct.

THE COURT: Otherwise, he has an obligation to make those reports for life.

ATTORNEY MOYER: Thank you, I wanted to make sure that was clear.

THE COURT: And you will be on probation until such time as this designation is overturned. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Further, with regard to the sentence, the Court will adopt the recommendation of the probation department and sentence the Defendant on the corruption of minors charge to a period of intensive probation for three years and for the charge of indecent assault, for a period of five years intensive probation concurrent with the charge of corruption of minors.

We direct that the Defendant attend sexual offender counseling with Gingerich and Associates, comply with

any further recommendations that that treatment recommends; pending approval otherwise, that there would not be any unsupervised encounters with youth under the age of 18. Children and Youth Services, if they conclude otherwise and counseling recommendations dictate otherwise, obviously can submit to the Court a modification of that request if the Defendant's deemed appropriate.

It's extraordinarily important that the Defendant cooperate with the counseling and cooperate with the Children and Youth Services in order to facilitate the visit even with the younger child that's been indicated.

It's important that he recognize that this Court has grave concerns. On the one hand there's an acknowledgment of guilt pursuant to the no contest, but on the other hand, there's a denial, and that denial is not compatible and conducive with rehabilitation.

One has to make a rethinking of what their priorities are in order to facilitate that which you are articulating to the Court you wish to do.

We direct that there not be any contact with Mrs. Collazo except under legal circumstances and with the children, of course, under supervision subject to further order under the auspices of Children and Youth.

You have 30 days within which to appeal this sentence. Failure to appeal will result in a waiver of your appellate rights.

If you cannot afford counsel, counsel will be appointed for you.

If within ten days of this date you seek modification of this sentence, that should be done again by way of

written petition. We note that this Court's probationary sentence is entered solely by virtue of the plea agreement.

We further note that had there not been a plea agreement and there been a finding of guilt, the nature of this offense would have resulted in imprisonment.

Have I missed anything?

ATTORNEY MOYER: I don't believe so, Your Honor.

THE COURT: Counsel, can you think of anything?

ATTORNEY MORAN: No, Your Honor.

THE COURT: Any questions, sir?

ATTORNEY MORAN: Judge, the mechanics of how he signs these forms, he needs to see the District Attorney after the hearing.

ATTORNEY MOYER: Yes, I was going to talk to you after the sentencing.

ATTORNEY MORAN: Thank you.

THE COURT: And those forms are then to be made part of the record.

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9/15/97

[J-172A-98]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 84 W.D. Appeal Docket 1997
Appellant	:	Appeal from the Order of the Erie County Court of Common Pleas, Criminal Division, dated September 23, 1997 at No. 922 of 1997.
v.	:	
DONALD FRANCIS WILLIAMS,	:	
Appellee	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
Appellee	:	
v.	:	No. 14 W.D. Appeal Docket 1998
DONALD FRANCIS WILLIAMS,	:	Appeal from the Order of the Superior Court at No. 2466PGH97 entered 3/9/98 transferring case to Supreme Court from the Judgment of Sentence of the Court of Common Pleas of Erie County, Criminal Division, entered October 1, 1997 at No. 900 of 1997.
Appellant	:	

ARGUED: September 16, 1998

OPINION

MR. JUSTICE ZAPPALA DECIDED: JUNE 30, 1999

This matter is before us on direct appeal from the order of the Erie County Common Pleas Court dated September 23, 1997, granting Donald Francis Williams' motion for extraordinary relief, which challenged the constitutionality of the sexually violent predator provisions of Title 42, Sections 9791-9799.6, Subchapter H, entitled, Registration of Sexual Offenders, 42 Pa.C.S. §§ 9791-9799.6, commonly known as Pennsylvania's Megan's Law (hereinafter Act).[1]

The factual history of this case is as follows. On February 2, 1997, Appellee Williams was arrested and charged with numerous sexual offenses. On May 23, 1997, a criminal information was filed, charging Williams with two counts of involuntary deviate sexual intercourse, 18 Pa.C.S. § 3123(a)(6), two counts of indecent assault, 18 Pa.C.S. § 3126(a)(7), and one count of corruption of minors, 18 Pa.C.S. § 6301(a). The charges stemmed from an allegation that Williams performed fellatio upon a nine year old male victim during the period between May

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[1] Following the abduction, murder and rape of seven-year-old Megan Kanka, New Jersey enacted the Registration and Community Notification Laws, Pub. L. 1994, Chs. 128, 133 (codified at N.J.S.A. 2C:7-1 to 7-11) as part of a ten-bill package referred to as "Megan's Law." By May of 1996, based upon federal legislation conditioning certain federal funding on states passing a registration and notification program, forty-nine states adopted sex offender registration laws and thirty-two states maintained some form of community registration. See *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir.1997), *cert. denied*, 118 S.Ct. 1039 (1998). See also 42 U.S.C.A. § 14071.

19, 1996 through December 23, 1996 and December 24, 1996 through December 31, 1996.

A jury found Williams guilty of the foregoing charges on July 15, 1997. Immediately following the verdict, the common pleas court ordered an evaluation of Williams pursuant to Section 9794(a) of the Act, which provides that

> [a]fter conviction, but before sentencing, a court shall order a person convicted of a sexually violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the [State Board to Assess Sexually Violent Predators].

Williams filed a motion for extraordinary relief raising numerous federal and state constitutional challenges to the sexually violent predator provisions of the Act, 42 Pa.C.S. § 9794-9799.6. Among the challenges made, Williams asserted that the Act violates his procedural due process rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution, because the Act impermissibly shifts the burden of persuasion to the offender by establishing a presumption that he is a sexually violent predator and requiring that he rebut the presumption by clear and convincing evidence. Section 9794(b) provides:

> An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

42 Pa.C.S. § 9794(b).

By opinion and order dated September 23, 1997, the common pleas court held that

> [b]y shifting the burden of proof to the defendant such that s/he is presumed to be a sexually violent predator and by placing the burden of rebuttal of that presumption on the defendant, [the Act] violates the Fifth and Fourteenth Amendments to the United States Constitution and Section Nine of Article One of the Pennsylvania Constitution.

Slip op. at 19.[2] Accordingly, the common pleas court refused to proceed with an assessment of whether Williams is a sexually violent predator in accordance with the Act and sentenced Williams in conformity with the sentencing guidelines applicable to his convictions.[3] The common pleas court noted that the effect of its decision was to leave intact only the purpose, definition, registration and some administrative provisions of the Act. Slip op. at 20, n. 11.

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[2] The court rejected all other constitutional claims raised by Williams regarding the Act. These included challenges concerning the Act's vagueness, the right against self-incrimination, and the right to counsel in the assessment process. The court also rejected the argument that the Act constitutes a bill of attainder and violates the right to privacy.

[3] Williams received an aggregate sentence of 10 years, 9 months to 45 years imprisonment.

The Commonwealth filed a direct appeal from the order of the common pleas court to this Court,[4] complaining that the common pleas court improperly declared the applicable provisions of the Act to be unconstitutional.[5] Before specifically addressing the arguments made by the Commonwealth regarding the constitutionality of the Act, a brief outline of its provisions and the statutory scheme set forth therein by the Legislature is instructive.

The Act is basically divided into two parts. Section 9794 of the Act and certain provisions that follow apply to those "offenders" who are designated "sexually violent predators." Section 9793 of the Act applies to "offenders" who are not classified as sexually violent predators. A person is an "offender" for purposes of the Act if he or she has been convicted of any of the offenses specified in Section 9793(b). Subsection (1) of Section 9793(b) lists applicable predicate offenses where the victim is a minor.

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[4] Pursuant to Section 722(7) of the Judicial Code, 42 Pa.C.S. § 722(7), this Court has exclusive jurisdiction of appeals from final orders of the common pleas court in

> [m]atters where the court of common pleas has held invalid as repugnant to the Constitution, treaties or laws of the United States, or the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any statute of, this Commonwealth, or any provision of any home rule charter.

[5] Williams filed a timely notice of appeal to the Superior Court from the trial court's decision and the Commonwealth filed a motion to quash the appeal. The Superior Court then transferred the matter here. On appeal, Williams asserts that the trial court erred in denying his remaining constitutional challenges to the Act; he also alleges various trial errors.

The offenses specified include the crimes of kidnapping (except by a parent), rape, involuntary deviate sexual intercourse, aggravated indecent assault, promoting prostitution, and crimes relating to obscene and other sexual materials and performances involving minors. Subsection (2) sets forth predicate offenses involving victims of any age and includes rape, involuntary deviate sexual intercourse, aggravated indecent assault and spousal sexual abuse. Indecent assault is also a predicate crime when the offense is a misdemeanor of the first degree. 42 Pa.C.S. § 9793(b)(3).

A person who is convicted of any of the foregoing predicate offenses is presumed to be a sexually violent predator. 42 Pa.C.S. § 9794(b). The Act defines a "sexually violent predator" as

> [a] person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

42 Pa.C.S. § 9792.

There is a distinct difference under the Act between the requirements and sanctions applicable to those persons who are classified as sexually violent predators and those who are not. Those offenders who are not classified as sexually violent predators are subject to the registration requirements set forth at Section 9793 of the Act. This provision requires that an offender register a current

address with the Pennsylvania State Police upon release from incarceration, being placed on parole, the commencement of a sentence of intermediate punishment or probation, or under the parole board's supervision. The State Police must be notified of an offender's change of address and a current address must be registered. The period of registration under this provision is ten years and failure to comply with the provision is a felony of the third degree.[6]

If a person is classified as a sexually violent predator under the Act, he or she is subjected to much broader registration and notification requirements. Specifically, Section 9795(a) of the Act requires potentially lifetime registration of a current address with the State Police "unless the court determines the person is no longer a sexually violent predator." Verification of a current address is required every 90 days. 42 Pa.C.S. § 9796(a).

Section 9797(b) of the Act specifies that the crime victim of a sexually violent predator shall be given written notice when an offender registers an address initially, and when a change of address is provided. Section 9798(a) provides for extensive public notification of the name, address, offense, designation and photograph of sexually violent predators. Subsection (b) specifies that notification of the foregoing information is to be given to the neighbors of sexually violent predators, the director of county child and youth services where the sexually

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[6] The validity of the ten-year registration provisions is not before us. But see *Commonwealth v. Gaffney*, No 65 M.D. Appeal Docket 1998 (filed June 30, 1999), where we upheld these provisions when faced with an ex post facto challenge thereto.

violent predator resides, the superintendent of each school district in the area, including private and parochial schools, the director of licensed day care facilities in the municipality where the sexually violent predator resides and the president of any college, university and community college located within 1,000 feet of a sexually violent predator's residence.

In addition to the foregoing, Section 9799.4(a) of the Act provides for enhanced punishment of sexually violent predators. Specifically, this section provides that once a person is classified as a sexually violent predator, "the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) . . . shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses." Subsection (b) of this provision requires sexually violent predators to attend monthly counseling sessions and subsection (c) provides that

> [n]otwithstanding any other provision of law to the contrary, when a person who has been designated as a sexually violent predator is convicted of a subsequent sexually violent offense, the mandatory sentence shall be life imprisonment. . . .

42 Pa.C.S. § 9799.4.

The issue here involves the constitutionality of the method by which offenders are designated sexually violent predators. As noted, once a person is convicted of one of the predicate offenses specified in Section 9793(b) of the Act, he or she shall be presumed to be a sexually violent predator. 42 Pa.C.S. § 9794(b). Despite the fact that this presumption attaches upon conviction, the Act

requires that after conviction, but before sentencing, the State Board to Assess Sexually Violent Predators conduct an assessment to determine if the offender is a sexually violent predator.[7] Section 9794(c) of the Act lists ten factors that the Board should consider in making such determination.[8] The offender does not participate in the assessment proceeding by the Board.

Following its assessment, the Board is required to submit a written report to the trial court within 60 days of the offender's conviction. Section 9794(e) specifies that

> [u]pon receipt of the Board's report, the trial court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to

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[7] The Board is to be composed of psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders. 42 Pa.C.S. § 9799.3(a).

[8] These include the offender's age, any prior criminal record, the age of the victim, whether the offense involved multiple victims, the use of illegal drugs, whether the offender completed any prior sentence and attended sex offender programs, any mental illness or mental disability, the nature of the sexual contact and whether there is a demonstrated pattern of abuse, whether unusual cruelty was involved, and any behavior characteristics that contribute to the offender's conduct.

> have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. . . .

As noted, throughout the foregoing proceedings by the Board and the trial court, the presumption that the offender is a sexually violent predator continues. It is the offender who bears the burden of rebutting the presumption and the standard of proof required to rebut the presumption is clear and convincing evidence. 42 Pa.C.S. § 9794(b). It is these requirements that the trial court found offensive to procedural due process.

The Commonwealth and the Attorney General, as amicus, argue that the trial court erred in concluding that the proceeding to determine whether an offender is a sexually violent predator is violative of procedural due process. While both concede that a sentencing proceeding is subject to the requirements of due process, they maintain that because the presumption that an offender is a sexually violent predator arises after an offender has been found guilty beyond a reasonable doubt of one of the enumerated offenses specified in the Act, the full panoply of procedural rights are no longer due. Moreover, they maintain that the Act comports with due process in that it provides an offender with specific due process protections including the right to present evidence and call witnesses before the factfinder, the right to present expert witnesses and cross-examine witnesses,

and the right to have counsel present, including the right to have counsel appointed.

Both the Commonwealth and the Attorney General liken the sexually violent predator provisions of the Act to the mandatory minimum sentencing provision that withstood constitutional scrutiny by this Court and the *United States Supreme Court in Commonwealth v. Wright*, 508 Pa. 25, 494 A.2d 354 (1985), affirmed *McMillan et al. v. Commonwealth*, 477 U.S. 79 (1986).

To the contrary, Appellee and amici, the American Civil Liberties Union of Pennsylvania and the Public Defender Association of Pennsylvania, argue that the procedure whereby it is determined whether an offender is a sexually violent predator under the Act is more akin to the provisions struck down as violative of due process by the United States Supreme Court in the case of *Specht v. Patterson*, 386 U.S. 605 (1967); see also *Gerchman v. Maroney*, 355 F.2d 302 (3rd Cir. 1966), and *Commonwealth v. Dooley*, 209 Pa. Super. 519, 232 A.2d 45 (1967).

In *Wright*, we upheld the constitutionality of Section 9712 of the Mandatory Minimum Sentencing Act, 42 Pa.C.S. § 9712, which requires the imposition of a minimum sentence of five years' total confinement upon a finding that a person was in visible possession of a firearm during the commission of certain felonies. At issue was subsection (b) of Section 9712, which provides:

> (b) Proof of sentencing. – Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after

> conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

There, we addressed five consolidated decisions concerning the constitutionality of Section 9712. In all five cases, the defendants had been convicted of one of the enumerated offenses set forth at Section 9712 and the Commonwealth sought to proceed thereunder. In four of the decisions under review, the trial court determined the provision to be unconstitutional and declined to apply Section 9712. In the remaining case, a constitutional challenge was rejected and the defendant was sentenced to the mandatory minimum sentence of five years' imprisonment.

The trial courts that found this section to be constitutionally infirm did so based upon the conclusion that the preponderance standard is violative of procedural due process, because, contrary to the statutory language, visible possession of a firearm is an element of the crime for which the defendant is being sentenced. Accordingly, in compliance with the United States Supreme Court's decisions in *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the courts held that proof beyond a reasonable doubt of this fact was required.[9]

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[9] In *Winship*, 397 U.S. at 364, the Court stated:

Lest there be any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due

We rejected this rationale, noting that the statutory language explicitly provides that visible possession of a firearm is not an element of the crime and that the reasonable doubt standard, traditionally, has been dependent on "how a state defines the offense." *Wright*, 508 Pa. at 34, 494 A.2d at 359, quoting *Patterson v. New York*, 432 U.S. 197, 211, n. 12 (1977). We stressed that Section 9712 comes into play only after there has been a conviction of one of the underlying enumerated felonies and that there is neither an increase in the maximum sentence for such felony nor a separate sentence imposed. We noted,

> [i]n making visible possession of a firearm a sentencing factor to be considered only after conviction of specified offenses, the legislature has in no way relieved the prosecution of its burden of proving guilt. Section 9712 creates no presumption as to any essential fact and places no burden on the defendant. Thus under *Winship, Mullaney* and *Patterson* the Due Process Clause does not require that visible possession be treated as an element of the underlying offense to be proved beyond a reasonable doubt.

Wright 508 Pa. at 35-36, 494 A.2d at 358.

The United States Supreme Court upheld our decision in *Wright*, also noting that because visible possession of a firearm is not an element of the underlying crimes, which, undoubtedly, the state must prove beyond a reasonable doubt, but instead is a sentencing factor that comes into play only after the defendant has been found

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Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

guilty, the convicted defendant is not entitled to the full panoply of due process protections. The Court noted:

> Indeed, the elements of the enumerated offenses, like the maximum permissible penalties for those offenses, were established long before the Mandatory Minimum Sentencing Act was passed. While visible possession might well have been included as an element of the enumerated offenses, Pennsylvania chose not to redefine those offenses in order to so include it, and Patterson teaches that we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.

McMillan, 477 U.S. at 86. The Court, however, recognized that in certain circumstances, the State's authority in this regard was not unlimited:

> [O]f course, there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship's* reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged.

Id.

Finally, the Court noted that the situation a convicted defendant faced pursuant to Pennsylvania's Mandatory Minimum Sentencing Act was quite unlike the situation faced by a criminal defendant in *Mullaney*, where the Court struck down Maine's homicide statute. In *Mullaney*, a single generic offense of felonious homicide was enacted with three "punishment categories" based on degree of culpability. Under the statute, intent was not an element of the crime, but had bearing only on the appropriate punishment category. As a result, "Maine could

impose a life sentence for any felonious homicide – even one that traditionally might be considered involuntary manslaughter – unless the defendant was able to prove that his act was neither intentional nor criminally reckless." *Mullaney,* 421 U.S. at 699 (emphasis in original) (footnote omitted). In distinguishing the facts in *McMillan,* the Court noted:

> The Court in *Mullaney* observed, with respect to the main criminal statute invalidated in that case, that once the State proved the elements which Maine required it to prove beyond a reasonable doubt the defendant faced "a differential in sentencing ranging from a nominal fine to a mandatory life sentence." 421 U.S. at 700. In the present case the situation is quite different. . . . Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the specified finding of visible possession of a firearm. Section 9712 "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioner's claim that visible possession under the Pennsylvania statute is "really" an element of the offenses for which they are being punished – that Pennsylvania has in effect defined a new set of upgraded felonies – would have at least more

> superficial appeal if a finding of visible possession exposed them to greater or additional punishment . . . but it does not.

McMillan, 477 U.S. at 87-88 (footnote omitted) (citation omitted).

In *Specht*, which was decided before *McMillan* and upon which Appellee relies, the United States Supreme Court struck down Colorado's Sex Offenders Act as violative of procedural due process. The petitioner in *Specht* was convicted of the crime of indecent liberties under a Colorado statute which provided a maximum sentence of 10 years; he was, however, sentenced under the Sex Offenders Act for an indeterminate term of from one day to life imprisonment. The Sex Offenders Act was implicated where the trial court believed that a person convicted of specified sex offenses, "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.*, 386 U.S. at 607.

The petitioner's complaint stemmed from the proceedings whereby the critical finding to be made under the Sex Offenders Act was reached without a hearing or the right to confront witnesses. The Court, in finding the proceedings under the Colorado Act to be unconstitutional, held:

> These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause. We hold that the requirements of due process were not satisfied here. The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one

> conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. *That is a new finding of fact that was not an ingredient of the offense charged.* The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.

Id. at 609, 87 S.Ct. 1209 (citations omitted) (footnote omitted) (emphasis added).

Prior to the Court's decision in *Specht*, the Court of Appeals for the Third Circuit struck down a similar provision in this State's Barr-Walker Act. The Third Circuit's analysis focused on the penal nature of the proceedings under Barr-Walker in finding the Act to be invalid.

> The Act leaves no doubt, both in its language and its purpose, that it is a criminal statute and that what is imposed under its authority is criminal punishment. Its title and its text are replete with language which reveals that the proceeding is penal in nature. It may be invoked only after a precedent conviction of guilt of one of the specified crimes and prescribes a new and radically different punishment. A maximum sentence of life imprisonment is made mandatory and from it the defendant may only be released on the determination by the Pennsylvania Board of Parole that the "interest of justice" so dictates. It is true that the Act provides for periodic psychiatric and psychological examinations which the Board of Parole is to review. But it is no less a criminal proceeding and no less the infliction of criminal punishment because the Act provides

> for such studies, especially when this is accompanied by the drastic potential of life imprisonment if they do not affirmatively provide a basis for release. This criminal punishment does not lose its characteristic because the Act goes beyond simple retribution. "It would be archaic to limit the definition of 'punishment' [under the Bill of Attainder Clause] to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent – and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."

Gerchman, 355 F.2d at 309-310, citing *United States v. Brown*, 381 U.S. 437 (1965).

Agreeing with the Third Circuit's analysis, the *Specht* Court noted what process is due under the statutory scheme set forth by the Colorado and Pennsylvania legislatures:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.

Id., 386 U.S. at 608-609, citing *Gerchman*, 355 F.2d at 312.

As noted, the Court had the benefit of its *Specht* decision when reviewing our determination in *Wright*. A similar argument to the one advanced by Appellee here, i.e., that *Specht* requires that the Act be invalidated, was put forth by the petitioners in *Wright/McMillan*. The Court, however, distinguished the post-trial proceeding in *Specht* from the one faced by the petitioners in *Wright/McMillan*.

> [T]he Court in *Specht* observed that following trial the Colorado defendant was confronted with "a radically different situation" from the usual sentencing proceeding. The same simply is not true under the Pennsylvania statute. The finding of visible possession of a firearm of course "ups the ante" for a defendant, or it would not be challenged here; but it does so only in the way that we have previously mentioned, by raising the minimum sentence that may be imposed by the trial court.

McMillan, 477 U.S. at 89.

Finally, the *McMillan* court recognized that analysis in this area is dependent upon differences of degree in the statutory scheme set forth by state legislatures.

> [W]e have noted a number of differences between this case and *Winship*, *Mullaney*, and *Specht*, and we find these differences controlling here. Our inability to lay down any "bright line" test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different

> results. We have no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line.

Id. at 91.

Given the foregoing guidance, just as the Court in *McMillan* had no doubt that this State's Mandatory Minimum Sentencing Act fell on the permissible side of the constitutional line, we have no doubt that the sexually violent predator provisions of the Act fall on the impermissible side.

Initially, we note that the proceedings whereby one is determined to be a sexually violent predator set forth in the Act are more akin to the provisions found in *Specht* and *Gerchman* than the provision at issue in *McMillan*. As in *Specht* and *Gerchman*, the determination of whether one is a sexually violent predator is a separate factual question that commences following an offender's conviction of one of the specified offenses found in the Crimes Code. Specifically, the court is faced with factually determining whether the convicted offender is a person who "due to a mental abnormality or personality disorder . . . [is] likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9792. The Act defines mental abnormality as "[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." *Id.*

Once the foregoing factual determination is made, the sexually violent predator is subjected to heightened criminal punishment pursuant to the Act. Specifically, as

previously noted, the mandatory maximum penalty for conviction of a predicate offense is increased to the offender's lifetime. 42 Pa.C.S. § 9799.4(a). Moreover, a subsequent conviction subjects the offender to a mandatory sentence of life imprisonment. 42 Pa.C.S. § 9799.4(c). Thus, despite the fact that the legislature intended that the Act serve as "a means of assuring public protection," by increasing the punishment for the listed predicate offenses where the offender is determined to be a sexually violent predator, the goals of the sexually violent predator provisions are equally punitive.[10] Unlike the

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[10] We wish to note that the "Declaration of policy" set forth by the Legislature at Section 9791(b) of the Act merely references the registration and notification provisions and the goals sought by the Legislature regarding their enactment. Section 9791(b) provides:

> It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to member of the general public as a means of assuring public protection and shall not be construed as punitive.

The Act is silent with respect to the Legislature's intention regarding the increased criminal sanctions to be imposed upon sexually violent predators; however, as noted by the *Gerchman* court, "[o]ne of the reasons society imprisons those convicted of crimes it [sic] to keep them from inflicting future harm, but that

situation in *Wright/McMillan*, where a person found to be in visible possession of a firearm was required to be sentenced to a minimum term of 5 years, a sentence encompassed within the purview of the sentencing guidelines for the crimes charged, the Act expands the maximum sentence to be imposed for the predicate crimes to a mandatory life sentence if the offender is found to be a sexually violent predator.[11]

The Commonwealth argues that *Specht* is distinguishable from the facts here because the Colorado statute at issue failed to provide a convicted defendant with a right to be present, to be heard or to confront and cross-examine witnesses regarding the relevant factual determination in that case (i.e., whether a person convicted of specified sex offenses, "if at large, constitutes a threat of

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does not make imprisonment any the less punishment." *Gerchman*, 355 F.2d at 310.

Given that we view the increased criminal sentencing provisions applicable to sexually violent predators to be punitive, we need not reach the additional argument put forth by Appellee that the enhanced notification provisions imposed on those who are deemed to be sexually violent predators are, likewise, punitive.

[11] The predicate offenses listed in Section 9793(b) range from a misdemeanor of the first degree to a felony of the first degree. See 18 Pa.C.S. § 2901 (kidnapping, F-1), § 3121 (rape, F-1), § 3123 (involuntary deviate sexual intercourse, F-1), § 3125 (aggravated indecent assault, F-2), § 3128(a) & (b) (spousal assault, F-2), § 5902(b) (prostitution, F-3), § 5903(a)(3), (4), (5) or (6) (relating to obscene and other sexual materials and performances, M-1). The maximum sentence for a misdemeanor of the first degree is 5 years' imprisonment. 18 Pa.C.S. § 1104(1). The maximum sentence for a felony in the first degree, the most serious offense, is 20 years' imprisonment. 18 Pa.C.S § 1103(1).

bodily harm to members of the public, or is an habitual offender and mentally ill.") *Specht*, 386 U.S. at 607. The Commonwealth points out that pursuant to the Act, an offender is given notice of the hearing wherein the trial court is to determine whether he or she is a sexually violent predator. Also, an offender is provided an opportunity to be heard, confront witnesses and be represented by counsel. 42 Pa.C.S. 9794(e). Thus, the Commonwealth argues that sufficient due process is afforded to an offender pursuant to the Act unlike under the Colorado provision at issue in *Specht*.

Initially, we point out that although a convicted offender is afforded the foregoing procedural rights at the hearing before the trial court, because of the presumption set forth in the Act, he or she is already considered to be a sexually violent predator and is, essentially, afforded no due process regarding this finding. The due process rights afforded an offender at the hearing before the trial court are granted for the purposes of providing an offender the opportunity to rebut the presumption that he or she is a sexually violent predator.

Additionally, contrary to the Commonwealth's assertion that the Act is constitutionally sound because an offender is afforded some due process protections, the *Specht* court was not concerned with the convicted offender under the Colorado scheme receiving *some form* of due process rights. To the contrary, given that the Court viewed the proceeding set forth in the act as a separate fact finding endeavor, the end result of which subjected the defendant to additional criminal punishment, the Court agreed with the court in *Gerchman* that "[a]t such a hearing the requirements of due process

cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the *full panoply of relevant protections* which due process guarantees in state criminal proceedings." *Specht*, 386 U.S. at 608-609, citing *Gerchman*, 355 F.2d at 312.

As the foregoing reveals, the *Specht* Court would not have been satisfied with a convicted defendant receiving partial due process protections under the statutory scheme set forth by the Colorado Legislature.[12] Nevertheless, this is precisely what the Commonwealth advocates here. Given our view, however, that the proceeding set forth in the Act to determine whether one is a sexually violent predator is a separate factual determination, the end result of which is the imposition of criminal punishment, we hold that anything less than the full panoply of the relevant protections which due process guarantees is violative of the Fourteenth Amendment. Accordingly, we find the Act's imposition of the presumption that a person convicted of a predicate offense is a sexually violent predator, and the requirement that the offender rebut the presumption, to be constitutionally repugnant.[13]

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[12] We are not unaware that *Winship* was decided after *Specht*. Nevertheless, it is without question that the due process considerations articulated by the Court in *Winship* are part and parcel to the "full panoply of relevant protections which due process guarantees in state criminal proceedings." Thus, we find unpersuasive any argument that the due process considerations advocated in *Winship* are somehow inapplicable where it is determined that one is entitled to the full panoply of due process protections.

[13] While it is not our province to guide the legislature in drafting relevant legislation, we point out that the United States Supreme Court recently upheld Kansas's Sexually Violent

We are aware that in analyzing the constitutionality of any statutory provision, there is a strong presumption that legislative enactments do not violate the constitution. *Commonwealth v. Barud*, 545 Pa. 297, 304, 681 A.2d 162, 165 (1996). There is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. *Id.* Moreover, a statute "will only be found unconstitutional if it clearly, palpably and plainly violates the constitution." *Id.*, citing *Commonwealth v. Mikulan*, 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983).

Nevertheless, even if we were to view the post-conviction proceeding set forth in the Act to be a mere sentencing proceeding where the court is charged with considering sentencing factors as advocated by the Commonwealth, we are still not persuaded that the statutory scheme set forth by the Legislature in the Act is constitutionally sound.

In *Wright*, this Court discussed whether the preponderance of the evidence standard set forth at Section 9712(b) satisfied the dictates of due process. Initially, we recognized that even in a sentencing proceeding, due process requirements are applicable. We noted:

Predator Act in *Kansas v. Hendricks*, 521 U.S. 346 (1997), where a substantive due process challenge was raised. There, Kansas specified civil commitment for those offenders found to be sexually violent predators due to a "mental abnormality." Significantly, pursuant to the scheme set forth by the Kansas Legislature, if civil commitment is sought, a trial is conducted and the burden of proving beyond a reasonable doubt whether the individual is a sexually violent predator is upon the State. See *id.* at 353.

[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967). The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. See *Witherspoon v. Illinois*, 391 U.S. 510, 521-523 (1968); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (footnote omitted).

Although sentencing proceedings must comport with due process, the convicted defendant need not be accorded the "entire panoply of criminal trial procedural rights." *Id.* at 358 n. 9. As the United States Supreme Court has explained:

Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation to authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

Id. 508 Pa. at 36-37, 494 A.2d at 359-360.

We then set forth the relevant due process considerations when evaluating the appropriate standard of proof in a given situation. Citing the analysis set forth by the United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982), we noted:

> In *Addington v. Texas* 441 U.S. 418 (1979), the Court, by unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.
>
> Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that

historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos(e) almost the entire risk of error upon itself."

The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has traditionally been left to the judiciary to resolve." "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'

This Court has mandated an intermediate standard of proof – "clear and convincing evidence" – when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." Notwithstanding "the state's 'civil labels and good intentions,' " the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."

Wright, 494 A.2d at 359-361 (footnotes omitted), citing *Santosky v. Kramer*, 455 U.S. 745, 754-756 (citation omitted).

In *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976), the Court articulated the specific factors courts should consider in determining the appropriate standard of proof required by the Fourteenth Amendment:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In *Wright*, we compared the liberty interest of a defendant convicted of a serious felony, whose right to remain free from confinement has been extinguished and whose maximum permissible term of imprisonment remained unaffected, with the Commonwealth's countervailing and important interest in seeking to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally. In weighing the two, we held that

> it is reasonable for the defendant and the Commonwealth to share equally in any risk of error which may be present in the factfinding process. In the context of a section 9712 proceeding, moreover, the risk of error is slight. Visible possession of a firearm is a straightforward issue

> susceptible of objective proof. There is scant potential that suspicion and conjecture will enter into the factfinder's decision. In addition, evidence of visible possession is amenable to meaningful appellate review.

Wright, 494 A.2d at 362.

More recently, the Third Circuit in *Verniero*, engaged in the foregoing analysis in relation to New Jersey's Registration and Community Notification Laws, i.e., Megan's Law. While there are many differences between New Jersey's registration and notification provisions and the Act established by our Legislature, many relevant similarities exist between the two statutes. For example, similar to our Act, under the statutory scheme set forth by New Jersey's Legislature, all persons convicted of a designated predicate crime involving sexual assault are subjected to certain registration requirements.[14] Pursuant to New Jersey's scheme, this information provides a basis for further community notification. The prosecutor of the county where the registrant intends to reside and the prosecutor from the county of conviction then use the registration information to assess the risk of re-offense by a registrant. Three tiers regarding a registrant's likelihood of re-offending are established, tier 1 representing a low risk of re-offense and tier 3 representing a high risk.

The extent of the public notification required of a particular registrant depends upon the classification established by the prosecutors. Under tier 1, only law

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[14] The registration requirements found in New Jersey's Act were upheld by the Third Circuit in *Artway v. Attorney General*, 81 F.3d 1235 (3rd Cir.1996).

enforcement officials are notified of a registrant's whereabouts. Tier 2 and 3 require more extensive public notification to schools, community organizations, day care centers and other organizations. Unlike our Act, New Jersey's Act does not provide for an increase in the mandatory maximum sentence for those found to be at a moderate (tier 2) or high (tier 3) risk for re-offending.

Under amended procedures established by New Jersey's Supreme Court, the state was required to make available a pre-notification judicial review process for sex offenders who wished to contest their classification or the notification plan. See *Doe v. Poritz*, 662 A.2d 367, 382 (N.J. 1995). Similar to our Act, the registrant at such proceeding bore the burden of persuasion. The standard of proof required under New Jersey's scheme was a preponderance of the evidence.

The *Verniero* court held that the foregoing scheme violated the procedural due process rights of a registrant. Initially, the court concluded that the notification provisions applicable to tier 2 and 3 registrants are non-punitive. *Verniero*, 119 F.3d at 1105. Next, the court applied the test set forth in *Mathews*, observing that

> [n]otification puts the registrant's livelihood, domestic tranquility, and personal relationships all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least 15 years. As the New Jersey Supreme Court recognized in Doe, a registrant thus has a compelling interest in an accurate and reasonable disposition of the issues before the court in a Megan's Law hearing.

Id. at 1107. The court then noted the state's "compelling interest in protecting its citizens by giving prompt notification to potential victims and relevant caregivers with respect to registrants who are accurately determined to be Tier 2 or Tier 3." *Id.* Conversely, the court recognized that "the state has no substantial interest in notifying persons who will not come into contact with the registrant; nor has it any interest in notifying those who will come into contact with a registrant who has erroneously been identified as a moderate or high risk." *Id.* at 1107-8. Given the foregoing competing interests, the court concluded that the burden of proof must remain with the state if the risk of error will be materially reduced without materially impairing the state's ability to secure a prompt determination and without imposing substantial new administrative burdens. *Id.*

The court then noted that an assessment of the future dangerousness of a particular registrant is a necessary inquiry at the "Megan's Law hearing," an undertaking "involving substantial uncertainty." The court observed that the fact-finding function involved is made difficult because sex crimes generally have a limited number of witnesses which creates the need for credibility determinations. Further, the issues are resolved in a proceeding in which the rules of evidence are not applied and the proceedings have a strict timetable. Thus, the court concluded that placing the burden of persuasion on the prosecutor will substantially reduce the risk of an erroneous outcome. The court noted:

> Courts are human institutions and there is, of course, risk of error in every judicial proceeding. . . . When the court in a Megan's Law

> hearing simply cannot tell which of two conflicting accounts (regarding the use of force, perhaps) represents the historical truth, allocation of the burden of persuasion is likely to be outcome determinative. The same is true in those cases in which the trier of fact finds inconsistencies or implausible elements in the victim's account, but, at the same time, is inclined to discount the registrant's account because of his criminal history or the enormity of his stake in the outcome. In these cases, as well as others in which the trier of fact discounts the account of the registrant for similar reasons, requiring the prosecutor to affirmatively convince the court of the important facts can be expected to materially reduce the risk of error.

Id. at 1109.

Finally, the *Verniero* court concluded that assignment of the burden of proof to the state would not materially impair the state's ability to receive a prompt determination or impose new administrative burdens.

Although we are not bound by the Third Circuit's analysis of New Jersey's Megan's Law, and despite the differences between the two provisions, we find the foregoing analysis to be equally applicable to the sexually violent predator provisions found in the Act, if not more so.[15]

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[15] The Superior Court likewise found the *Verniero* court's analysis regarding whether the state or the offender should bear the burden of proof at the sexually violent predator hearing to be persuasive. See *Commonwealth v. Halye*, 719 A.2d 763 (Pa. Super. 1998) (where the court struck as unconstitutional Section 9794 and all remaining provisions of the Act that refer to the designation of a sexually violent predator).

Notwithstanding the private interest in avoiding the mandatory maximum life sentence applicable to sexually violent predators, the private concerns articulated by the *Verniero* court apply equally to the notification provisions applicable to sexually violent predators. One's livelihood, domestic tranquility and personal relationships are unquestionably put in jeopardy by the notification provisions. Conversely, as noted in *Verniero*, the state has a compelling interest in protecting its citizens by providing prompt information to potential victims of sexually violent predators. The state, however, has no legitimate interest in notifying the public of those persons who have been erroneously identified as sexually violent predators. Thus, the state has an interest in assuring that the classification system is both fair and accurate.

Unlike the situation in *Wright/McMillan*, where the determination of whether one was in visible possession of a firearm was a "straightforward issue susceptible of objective proof" and where "the risk of error [was] slight," here, as in *Verniero*, a subjective assessment of an offender's potential future dangerousness is a necessary inquiry in determining whether one is a sexually violent predator. As noted, the Board, in making its assessment considers a variety of elements in reaching its determination regarding whether an offender is a sexually violent predator. Additionally, just as in *Verniero*, the evidence that could be presented at the sexually violent predator proceeding may not have been presented at trial and will largely consist of the testimony of the offender and the victim. Resolution of issues regarding the evidence presented at the proceeding are not subject to the rules of evidence according to the Act and the court is under a

time restriction to conduct the proceeding. Accordingly, the risk of an error at a sexually violent predator proceeding is far greater than was present in *Wright/McMillan*.

Given the foregoing analysis, we believe that the state must bear the burden of demonstrating that an offender is a sexually violent predator.[16] Where resolution of competing facts is outcome determinative, "requiring the prosecutor to affirmatively convince the court of the important facts can be expected to materially reduce the risk of error." *Verniero*, 119 F.3d at 1109.

Based on the foregoing, we find the sexually violent predator provisions of the Act to be violative of the procedural due process guarantees of the Fourteenth Amendment.[17] Accordingly, we strike all of the relevant

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[16] We do not perceive any material impairment to the state's ability to receive a prompt determination of the issues involved. All of the relevant information available to the board in issuing an assessment would also be available to the prosecution. Moreover, we do not find that placing the burden of proof on the state at the sexually violent predator proceeding would impose new administrative burdens. In fact, because the state would be in a position to forgo pursuing an inquiry before the trial court where the state did not perceive the offender to be a sexually violent predator, placing the burden on the state could actually reduce the administrative burdens involved.

[17] Because we conclude that the trial court properly determined that the Act is violative of the procedural due process requirements of the Fourteenth Amendment, we need not address the remaining constitutional challenges raised, or analyze the due process provisions of the State Constitution since the federal constitution establishes certain "minimum" standards, which each state has the power to expand. See *Commonwealth v. Edmunds*, 526 Pa. 374, 894 (1991).

provisions of the Act pertaining to sexually violent predators and remand the matter to the Superior Court for further disposition of the remaining issues raised on appeal.[18]

Jurisdiction relinquished.

Justice CASTILLE files a Dissenting Opinion.

DISSENTING OPINION

MR. JUSTICE CASTILLE DECIDED: JUNE 30, 1999

I respectfully dissent because I do not believe that the provisions of the Registration of Sexual Offenders Act, commonly known as Pennsylvania's Megan's Law, 42 Pa.C.S. §§ 9791-9799.6, ("Act"), which impose the presumption that a person convicted of a sexually violent offense is a sexually violent predator and require the offender to rebut the presumption by clear and convincing evidence, violate the procedural due process guarantees of the Fourteenth Amendment to the United States

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[18] We are not unaware that the statutory notes following Section 9791 of the Act specify that the provisions of the Act are to be construed as severable; however, because we find that the procedure whereby one is determined to be a sexually violent predator is unconstitutional, we strike all of the provisions referring to this designation.

Constitution.[1] The majority espouses that these provisions of the Act create an additional element to the predicate offenses which subjects the offender to additional punishment. Therefore, according to the majority, an offender subjected to these provisions is entitled to due process of law, which the Act fails to provide.

I agree with the majority that the Act is punitive insofar as it mandates sentences of imprisonment.[2] However, contrary to the majority, I believe that the Act is a mere sentencing scheme and does not create a separate criminal offense. Therefore, while an offender subject to the Act is entitled to due process, I believe that the Act provides all the process that is due.

Under the Act, if an offender is convicted of one of the predicate offenses listed in section 9793(b)(1),[3] the

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[1] The majority opinion rests solely on the Fourteenth Amendment to the United States Constitution and does not address the due process provisions of the Pennsylvania Constitution.

[2] Sections 9799.4(a) and (c) require a mandatory maximum sentence of life imprisonment for sexually violent predators, and an automatic life sentence for sexually violent predators who are convicted of a subsequent sexually violent offense.

[3] The predicate offenses are broken down into those involving minors and those involving victims of any age. The predicate offenses involving minors include kidnapping by someone other than a parent, rape, involuntary deviate sexual intercourse, aggravated indecent assault, promoting prostitution, and crimes relating to obscene and other sexual materials and performances. 42 Pa.C.S. § 9793(b)(1). The offenses involving a victim of any age include rape, involuntary deviate sexual intercourse, aggravated indecent assault, spousal sexual abuse and indecent assault which constitutes a first degree misdemeanor. 42 Pa.C.S. § 9793(b)(3).

State Board to Assess Sexually Violent Predators ("Assessment Board") conducts an assessment of the offender prior to the imposition of sentence.[4] The Act defines a sexually violent predator as "[a] person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9792. Accordingly, not all individuals who commit crimes of sexual violence are ultimately deemed sexually violent predators.

The Assessment Board gathers information on the offender for the purpose of determining whether the offender is a sexually violent predator. The Assessment Board considers the various factors set forth in section 9794(c), including the circumstances surrounding the crime, the defendant's psychological evaluations, participation in treatment programs, ages of the offender and victim, the offender's prior criminal record, drug history, behavioral characteristics and relationship to the victim. 42 Pa.C.S. § 9794(c).

The trial court then conducts a hearing wherein the offender has the burden to overcome the presumption

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[4] The Assessment Board consists of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of behavior and treatment of sexual offenders. 42 Pa.C.S. § 9799.3(a).

that he is a sexually violent predator by clear and convincing evidence. The offender is entitled to and is afforded notice prior to the hearing. At the hearing, the offender has the right to have counsel present and to have counsel appointed if needed, as well as the right to present evidence, to call witnesses, to cross-examine the witnesses against him and to present expert testimony. 42 Pa.C.S. § 9794(c).

When evaluating the constitutionality of any statute, there is a strong presumption in the law that legislative enactments do not violate the constitution. *Commonwealth v. Barud*, 545 Pa. 297, 304, 681 A.2d 162, 165 (1996). Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. *Id.* In order to successfully challenge a statute, the challenger must prove that the statute "clearly, palpably and plainly violates the Constitution." *Appeal of Torbik*, 548 Pa. 230, 239, 696 A.2d 1141, 1145 (1997). Any uncertainty must be resolved in favor of the validity of the statute. *Id.* While penal statutes are to be strictly construed, the courts are not required to give the words of a criminal statute their narrowest meaning or disregard the evident legislative intent of the statute. *Barud*, at 304, 681 A.2d at 165. It is with these standards in mind that I find fault with the majority's conclusion that the provisions of the Act in question are violative of due process. Initially, the Act does not deprive an offender of due process of law by presuming that he is a sexually violent predator following his conviction for a sexually violent offense. A statutory presumption may be sustained if there is a rational relationship between the fact proved and the ultimate fact presumed. *Tot v. United States*, 319 U.S. 463 (1943). "The

process of making the determination of rationality is, by its nature, highly empirical." *United States v. Gainey*, 380 U.S. 63, 67 (1965). This Court must give significant weight to the conclusions of the legislature concerning matters that are commonplace or not within specialized judicial competence. *Id.*

Here, the presumption that one who commits a sexually violent crime is a sexually violent predator is a sound presumption supported by rational legislative findings. Section 9791(a)(2) of the Act provides that "sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest." The legislature's determination regarding the risk of recidivism among sexually violent criminals merits our deference under the rational relationship standard.

The presumption that an offender is a sexually violent predator is rebuttable. The Act affords due process to the offender by providing him with an opportunity to be assessed by members of an Assessment Board whose findings are reviewed by the trial court. The offender is afforded a hearing wherein he has the right to counsel, the right to present evidence, to call witnesses, to present expert testimony, to confront and cross-examine the witnesses against him, and to have counsel appointed if he cannot afford private counsel. If the offender rebuts the presumption by clear and convincing evidence, application of the legislatively enacted maximum penalty is avoided.

In determining that the statutorily afforded opportunity to rebut the presumption is constitutionally insufficient, the majority first concludes that the determination of whether an offender is a sexually violent predator is a separate factual question which commences following a conviction and which subjects the offender to heightened criminal punishment. On this basis, the majority determines that the issue of the constitutionality of the provisions of the Act in question is controlled by *Specht v. Patterson*, 386 U.S. 605 (1967).

In *Specht*, the United States Supreme Court reviewed Colorado's Sex Offenders Act and determined that the Act violated due process. The Sex Offenders Act did not make the commission of a specified crime the basis for sentencing. Rather, it made one conviction the basis for commencing another proceeding wherein the trial court determined whether the defendant, if at large, would constitute a threat of bodily harm to members of the public, or was a habitual offender and mentally ill. If the trial court so determined, the defendant could be sentenced to an indeterminate term of imprisonment ranging from one day to life. The United States Supreme Court reasoned that, because invocation of the Colorado statute caused the initiation of a new charge leading to criminal punishment, the defendant was entitled to due process, which that statute failed to provide.

I believe that *Specht* does not mandate the majority's finding that the Act is violative of due process. The crucial difference between the Act and the Colorado statute is that the Colorado statute failed to provide a defendant with notice and a full hearing before the statute was invoked. The United States Supreme Court stated in

Specht that "due process, in other words, requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with the witnesses against him, have the right to cross-examine and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." *Specht*, 386 U.S. at 610. Here, the Act affords an offender **every single** protection which the United States Supreme Court mentioned in *Specht*. Under the Act, an offender is provided notice and is entitled to be present, to have counsel, either private or court-appointed, to be heard, to confront the witnesses against him, to cross-examine, and to present his own evidence including expert testimony. The trial court is required to set forth its determination on the sentencing order for purposes of appeal. 42 Pa.C.S. § 9794(e).

The fact that the Act provides for every protection which the *Specht* Court identified as necessary to satisfy due process renders the majority's conclusion that Specht is controlling untenable. The United States Supreme Court struck down the Colorado statute only because it lacked the precise procedural due process safeguards which the Act in question provides to offenders.

The majority's conclusion that a convicted sex offender is entitled to the full panoply of relevant protections with respect to the determination of whether he is a sexually violent predator is equally unsupportable. The majority concludes that, because an offender is already presumed to be a sexually violent predator upon being convicted of a predicate offense, he is afforded no due process regarding this finding. However, under the Act, the presumption that an offender is a sexually violent

predator arises only **after** an offender has been found guilty beyond a reasonable doubt or has entered a knowing and voluntary plea to one of the enumerated predicate offenses. Thus, the convicted offender to whom the presumption applies has forfeited certain legal rights which would be maintained by a defendant not yet convicted. Once the presumption of innocence has been overcome, the constitutional requirements relative to due process are of a lesser standard. *See Commonwealth v. Wright*, 508 Pa. 25, 39, 494 A.2d 354, 361 (1985), *aff'd sub nom. McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (once convicted, a defendant's right to remain free from incarceration has been extinguished, and he is subject to punishment).

While it is unquestionable that an offender subject to the Act is entitled to due process of law, due process is a flexible concept. The United States Supreme Court has stated:

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation to authority that due process is flexible and calls for such procedural protections as the particular situation demands . . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

In the instant matter, a jury convicted appellee of numerous predicate offenses stemming from acts he committed against a nine-year-old boy. Thus, "unlike cases in which a fundamental liberty interest is at stake, . . . the defendant's fundamental right, i.e., freedom from confinement, has already been forfeited." *Wright*, at 41, 494 A.2d at 362. Accordingly, while appellee was entitled to due process with respect to the determination of whether he was a sexually violent predator, by providing notice and by affording him the right to counsel, the right to be present, to present evidence including expert testimony, to confront the witnesses against him and to cross-examine witnesses, the Act provided appellee with sufficient due process.

The majority further determines that the provision of the Act which places the burden upon the defendant to prove by clear and convincing evidence that he is not a sexually violent predator violates the Due Process Clause of the Fourteenth Amendment. The Due Process Clause prevents a court from giving the Commonwealth the benefit of a presumption which would have the effect of relieving the Commonwealth of its burden of proving every element of a crime beyond a reasonable doubt. *See Walton v. Arizona*, 497 U.S. 639, 650 (1990) (plurality decision recognizing that the constitution is not violated by placing the burden upon a defendant to prove mitigating circumstances sufficiently substantial to call for leniency, so long as a state's method of allocating the burden of proof does not lessen the state's burden to prove every element of the offense charged). Under the Act, the Commonwealth has already met its burden of persuasion in securing the conviction on which the offender's status is

based. Thus, the defendant's status as a sexually violent predator is not an element of the crime, but is instead a sentencing consideration.

The majority reasons that the determination of whether an offender is a sexually violent predator is a separate factual question following conviction and, therefore, the burden should be on the Commonwealth to establish that an offender is a sexually violent predator beyond a reasonable doubt. However, the Act does not create a separate criminal offense. Rather, the Act merely instructs the trial court how an offender who has committed a predicate criminal act is to be sentenced. I agree that, insofar as the Act prescribes the sentencing options facing offenders, it does establish punishment. *See* 42 Pa.C.S. § 9799(a) & (c). However, it is the province of the legislature to determine the punishment imposable for criminal conduct. *Wright*, at 40, 494 A.2d at 361. The legislature has the right to fix the maximum penalty, and likewise, can if it sees fit, name the minimum. *Commonwealth v. Glover*, 397 Pa. 543, 544, 156 A.2d 114, 116 (1959). Here, the legislature could have acted within its authority and simply increased the maximum penalty for the predicate crimes. Instead the legislature drafted a detailed statute which affords a convicted criminal sex offender an opportunity to avoid the maximum penalty of life imprisonment.

With respect to placing the burden on the defendant to prove that he is not a sexually violent predator, the Act is not unlike other sentencing statutes which place the burden upon defendants to present factors to mitigate their sentences, a process which this Court has found to be constitutional. *See Commonwealth v. Zettlemoyer*, 500 Pa.

16, 66, 454 A.2d 937, 963 (1982), *cert. denied*, 461 U.S. 970 (1983), *rehearing denied*, 463 U.S. 1236 (1983) (capital sentencing scheme which requires the accused to prove, by a preponderance of the evidence, any mitigating circumstances that might convince a jury that the sentence should nevertheless be set at life imprisonment, is not offensive to due process).

In the Act, the legislature has taken one factor that has always been relevant when sentencing, the risk that an individual poses to society, and has legislated the consequence if the trial court determines that an offender poses such a risk. In this regard, the Act is similar to the sentencing provisions which this Court upheld in *Wright*. In *Wright* this Court upheld the portion of the Mandatory Minimum Sentencing Act, 42 Pa.C.S. § 9712 ("Sentencing Act") which mandated the imposition of a five-year minimum sentence when the preponderance of the evidence demonstrated that a defendant was in visible possession of a firearm during the commission of certain felonies. The appellants in *Wright* argued that visible possession of a firearm was an element of the crimes for which they were being sentenced and, therefore, the Commonwealth should have been required to prove the possession beyond a reasonable doubt.

In rejecting the claim that the Sentencing Act effectively made visible possession of a firearm a separate element of the underlying felonies, this Court cited *Patterson v. New York*, 432 U.S. 197 (1977), where the United States Supreme Court held that the reasonable doubt standard had always been dependent upon how a state

defines the offense.[5] *Wright*, at 34, 494 A.2d at 358. This Court noted in *Wright* that, in enacting the Sentencing Act, the legislature specifically stated that visible possession "shall not be an element of the crime." *Id.* at 29, 494 A.2d at 356 (quoting 42 Pa.C.S. § 9712(b)). This Court further noted that the mandatory minimum sentence did not come into play until after a defendant had been convicted of an enumerated felony. "In making visible possession of a firearm a sentencing factor to be considered only after conviction of specified offenses, the legislature has in no way relieved the prosecution of its burden of proving guilt." *Id.* at 35, 494 A.2d at 359.

The United States Supreme Court affirmed this Court's holding in *Wright*. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Like this Court, the United States Supreme Court cited its decision in *Patterson v. New York* for the proposition that the state need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or punishment." *Id.* at 84, 106 S.Ct. 2411 (quoting *Patterson*, at 207). In *McMillan*, the United States Supreme Court agreed with this Court that, because visible possession of a firearm was not an element of the underlying felony, but instead was a sentencing provision that came into play only after the defendant had been found guilty,

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[5] In *Patterson*, the United States Supreme Court held that a New York law which placed the burden on murder defendants to prove the affirmative defense of extreme emotional disturbance did not violate due process.

the Commonwealth did not have to prove visible possession beyond a reasonable doubt.

I do not find the majority's attempts to distinguish the instant matter from *Wright* and *McMillan* persuasive.[6] The majority reasons that, unlike in *Wright*, where a defendant found to be in visible possession of a firearm was required to be sentenced to a minimum of five years, a sentence encompassed within the purview of the sentencing guidelines for the crimes charged, here, an offender is subjected to heightened criminal punishment because the Act expands the maximum sentence to be imposed for the predicate crimes to life imprisonment if the offender is found to be a sexually violent predator. This argument fails simply because, as discussed *supra*, it is the province of the legislature to determine the boundaries of the punishment imposable for criminal conduct. Further, the United States Supreme Court, in dicta in *McMillan* stated that, if a finding of visible possession had, in fact, exposed defendants to greater or additional criminal punishment, this fact would have given the arguments raised by the defendants in *McMillan* "superficial" appeal. *McMillan* at 88. The fact that the Sentencing Act in question in *Wright* and *McMillan* did not create any presumptions is of no moment because, as discussed *supra*, the presumption created by the Act is reasonable.

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[6] One way in which the majority attempts to distinguish *Wright* from the instant matter is by concluding that the issue of whether an offender is a sexually violent predator is a separate element of the crime. I believe that this argument fails because as discussed *supra* at pp. 10-11, the Act is a mere sentencing scheme and does not create a new offense.

Finally, I disagree with the majority's conclusion that, even if this Court were to view the post-conviction proceeding set forth in the Act to be a mere sentencing provision, the Act would still not be constitutionally deficient. The majority reasons that the risk of error in the assessment of whether an offender is a sexually violent predator is great and involves a subjective determination by the trial court. The majority then compares this determination to the question present in *Wright/McMillan,* whether one was in visible possession of a firearm; which the majority deems an objective determination where the risk of error was slight.

In support of the proposition that placing the burden on the offender makes a Megan's Law hearing more unreliable than if the burden of persuasion rested with the Commonwealth, the majority cites the Third Circuit Court of Appeals' decision in *E.B. v. Verniero,* 119 F.3d 1077 (1997), *cert. denied,* 118 S.Ct. 1039 (1998). In *E.B. v. Verniero,* the Third Circuit held that New Jersey's version of Megan's Law violated procedural due process by placing the burden on the defendant at a Megan's Law hearing to establish by a preponderance of the evidence that his classification was in error. I do not find *E.B. v. Verniero* persuasive due to the significant differences between Pennsylvania's and New Jersey's versions of Megan's Law.

Under the New Jersey statute, the risk of re-offense is assessed by *prosecutors.* The prosecutors utilize extensive guidelines in order to classify offenders under a three-tier system, with the first tier representing a low risk of recidivism and the third tier representing a high risk of recidivism. The extent of public notification is linked to

the risk of re-offense.[7] If an offender opts to challenge his classification, he is limited to presenting the issues of whether the Registrant Risk Assessment Scale[8] has been accurately applied and whether there is something extraordinary about his particular case that takes it out of the "heartland" of cases within the scope of the tier that would have otherwise been indicated. *Id.* at 1108.[9] In determining that the New Jersey statute violated procedural due process, the *E.B. v. Verniero* court seemed particularly concerned over the role that the prosecutors played in weighing such factors as the offender's physical and mental condition, whether the offender had received counseling or treatment or was under supervision, and the offender's criminal history. *See E.B. v. Verniero,* at 1107-1110.

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[7] Under the New Jersey statute, only law enforcement officials are notified of the whereabouts of an offender who has been classified in the first tier. If an offender is classified in the second or third tier, more extensive public notification is required. *See E.B. v. Verniero* at 1082-87 (describing in detail the notification and registration requirements of the New Jersey statute).

[8] The scale is a numerical scoring system designed with the assistance of mental health and law enforcement professionals to evaluate the degree of risk of the sex offender. *E.B. v. Verniero,* at 1083-84.

[9] The *E.B. v. Verniero* court further noted that if an offender challenged not just the tier classification but also the reasonableness of the prosecutor's notification plan, the court must also exercise a judgment about whether the scope of the proposed notification is appropriate to the risk presented by the particular registrant.

The *E.B. v. Verniero* court determined that resolution of the issue of whether the scale had been accurately applied required fact-finding which posed more than a normal risk of error because it involved a subjective determination by the court regarding the degree and nature of the risk posed by the particular registrant. *Id.* at 1108. The court stated: "Thus, in resolving these issues, the court is necessarily required to assess future dangerousness. While the state is clearly entitled to require a court to undertake such an assessment, it is an undertaking involving substantial uncertainty." *Id.*

There is much less uncertainty surrounding a Megan's Law hearing under the Pennsylvania statute. The risk of re-offense is not assessed by prosecutors. Rather, the legislature has already determined that there is a great likelihood that one convicted of a violent sexual offense will offend again. "[I]n matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey*, 380 U.S. 63, 67 (1965). After a person is convicted of a predicate offense, an *independent* review board conducts an assessment of the offender and issues a report to the court. The Assessment Board is comprised of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of behavior and treatment of sexual offenders. 42 Pa.C.S. § 9799.3(a). The Assessment Board considers factors similar to those considered in any presentence report. *See* 42 Pa.C.S. § 9794(c). After receiving the Assessment Board's report, the court holds a full and

complete hearing in order to determine whether the offender is a sexually violent predator.

Unlike the New Jersey statute, the Act links the determination of whether one is a sexually violent predator not only to registration and notification, but also to the offender's maximum sentence. Accordingly, the offender is not only entitled to, but has a significant incentive to present as much mitigation evidence as possible to the trial court, thereby reducing the risk of error in the fact-finding process. A certain degree of risk is always present in any sentencing proceeding. However, a defendant's liberty interest is no more threatened by the Act's provisions than it is by any other mandatory incarceration provision. As *Wright* makes clear, although sentencing proceedings must comport with due process, the convicted defendant need not be accorded "the entire panoply of criminal trial procedural rights." *Wright* at 36, 494 A.2d at 360 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 n. 9 (1977)).

When evaluating the specific dictates required by the Fourteenth Amendment, this Court must consider: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and (3) the value of the government's interest, including the function involved and the burdens that an additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Here, the majority correctly notes that the state has a compelling interest in protecting its citizens by providing prompt information to potential victims concerning sexually violent predators. I further agree that a

defendant has a private interest in avoiding the mandatory maximum life sentence applicable to sexually violent predators.

However, before an offender can invoke a due process claim for a violation of his liberty interests, there must be a protectable interest. As discussed *supra*, a defendant's fundamental right to be free from confinement has already been forfeited by the fact of his conviction for the predicate offense. Thus, the government's interest in the safety and welfare of children and other potential victims far outweighs an offender's reduced liberty interest in avoiding a mere enhancement to a prescribed prison sentence. Preventing danger to the community is a legitimate regulatory goal, and the government's regulatory interest in community safety can often outweigh an individual's liberty interest. *United States v. Salerno*, 481 U.S. 739, 748 (1987) (holding that the Bail Reform Act of 1984 was not unconstitutional and that the Act's presumption that individuals arrested for certain serious offenses are far more likely to be responsible for dangerous acts in the community after arrest was not irrational or arbitrary). Further, an offender's reputation and personal life pales in comparison to the government's interest in the protection of the public from the high risk posed by sexually violent predators.

Thus, I see no constitutional violation in placing the burden of persuasion on the offender, since it is he who often times is the only person in possession of the information needed to rebut the presumption. Accordingly, I believe that while an offender is entitled to due process,

the Act provides all the process that is due.[10] For the aforementioned reasons, I dissent.

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[10] In my opinion, the Act is actually a defendant *friendly* enactment. Instead of providing an offender with the opportunity to avoid a life sentence as it has done in the Act, the legislature could have merely increased the maximum penalties for the predicate offenses to life imprisonment.

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES ANNOTATED PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED TITLE 42, JUDICIARY AND JUDICIAL PROCEDURE PART VIII, CRIMINAL PROCEEDINGS CHAPTER 97, SENTENCING SUBCHAPTER H. REGISTRATION OF SEXUAL OFFENDERS

42 Pa.C.S.A. §§ 9791-9799.6

§ 9791. Legislative findings and declaration of policy

(a) Legislative findings. – It is hereby determined and declared as a matter of legislative finding:

(1) If the public is provided adequate notice and information about sexually violent predators and certain other offenders, the community can develop constructive plans to prepare themselves and their children for the offender's release. This allows communities to meet with law enforcement to prepare and obtain information about the rights and responsibilities of the community and to provide education and counseling to their children.

(2) These sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest.

(3) The penal and mental health components of our justice system are largely hidden from public view and lack of information from either may result in failure of both systems to meet this paramount concern of public safety.

(4) Overly restrictive confidentiality and liability laws governing the release of information about sexually violent predators have reduced the willingness to release information that could be appropriately released under the public disclosure laws and have increased risks to public safety.

(5) Persons found to have committed such an offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.

(6) Release of information about sexually violent predators to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.

(b) Declaration of policy. – It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

§ 9792. Definitions

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Board." The State Board to Assess Sexually Violent Predators.

"Mental abnormality." A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

"Municipality." A city, borough, incorporated town or township.

"Offender." An individual who is:

(1) designated a sexually violent predator under the provisions of this subchapter; or

(2) required to register under section 9793(b) (relating to registration of certain offenders for ten years).

"Predatory." An act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

"Sexually violent offense." Any criminal offense specified in section 9793(b) (relating to registration of certain offenders for ten years).

"Sexually violent predator." A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain

offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

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§ 9793. Registration of certain offenders for ten years

(a) Registration. – A person convicted of any of the offenses set forth in subsection (b) shall be required to register a current address with the Pennsylvania State Police upon release from incarceration, upon parole from a State or county correctional institution, upon the commencement of a sentence of intermediate punishment or probation or where the offender is under the supervision of the Pennsylvania Board of Probation and Parole at the time of enactment of this section, within 30 days of the date of enactment of this section. Where the offender has been granted parole by the Pennsylvania Board of Probation and Parole, the board shall collect registration information from the offender and forward that registration information to the Pennsylvania State Police. The Department of Corrections shall not release the offender until it receives verification from the Pennsylvania State Police that it has received the registration information. Where the offender is scheduled to be released from a State correctional facility due to the expiration of the maximum term of incarceration, the Department of Corrections shall collect the information from the offender no later than ten

days prior to the maximum expiration date. The Department of Corrections shall forward the registration information to the Pennsylvania State Police. Where the offender scheduled to be released due to the maximum expiration date refuses to provide the registration information, the Department of Corrections shall notify the Pennsylvania State Police of the failure to provide registration information and of the expected date, time and location of the release of the offender. The chief county probation and parole official in cooperation with a county correctional facility shall, in accordance with established guidelines, obtain the required information contained in section 9799.2(2) (relating to duties of Pennsylvania Board of Probation and Parole) regarding offenders released from a county sentence and to submit the information to the Pennsylvania Board of Probation and Parole and the Pennsylvania State Police. The offender in a county correctional facility shall not be released from incarceration or released to a sentence of probation or intermediate punishment until the information has been obtained and submitted as required. The offender shall inform the Pennsylvania State Police within ten days if the offender changes residence. The offender shall register with a new law enforcement agency no later than ten days after establishing residence in another state. The period of registration shall be ten years.

(b) Persons required to register. –

(1) Persons convicted of any of the following offenses that are classified as a felony and involve a victim who is a minor:

18 Pa.C.S. § 2901 (relating to kidnapping) except by a parent.

18 Pa.C.S. § 3121 (relating to rape).

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

18 Pa.C.S. § 3125 (relating to aggravated indecent assault).

18 Pa.C.S. § 5902(b) (relating to prostitution and related offenses).

18 Pa.C.S. § 5903(a)(3), (4), (5) or (6) (relating to obscene and other sexual materials and performances).

(2) Persons convicted of any of the following offenses regardless of the age of the victim:

18 Pa.C.S. § 3121.

18 Pa.C.S. § 3123.

18 Pa.C.S. § 3125.

18 Pa.C.S. § 3128(a) and (b) (relating to spousal sexual assault).

(3) Persons convicted of 18 Pa.C.S. § 3126 (relating to indecent assault) when the offense is a misdemeanor of the first degree.

(c) Registration information. – The Pennsylvania State Police shall provide the information obtained under this section and sections 9795 (relating to registration of offenders) and 9796 (relating to verification of residence) to the chief law enforcement officer of the police department of the municipality in which the offender will reside. In addition, the Pennsylvania State Police shall provide this officer with the address at which the offender will reside following his release from incarceration, parole or probation.

(d) Out-of-State offenders. – A person who is convicted of an offense equivalent to any of the offenses listed in subsection (b) in any other state or territory or the District of Columbia, or in any Federal court, and who, within ten years of his release or parole from incarceration, makes his residence in Pennsylvania shall be required to register a current address with the Pennsylvania State Police and shall be subject to the other provisions of this subchapter relating to registration. The period of registration shall be for ten years from the offender's release or parole from incarceration.

(e) Penalty. – Any offender who fails to register with the Pennsylvania State Police as required in this section commits a felony of the third degree.

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§ 9794. Designation of sexually violent predators

(a) Order for assessment. – After conviction, but before sentencing, a court shall order a person convicted of a sexually violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the board. The order for an assessment shall be sent to the administrative officer of the board within ten days of the date of conviction.

(b) Presumption. – An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by

clear and convincing evidence at a hearing held in accordance with subsection (e).

(c) Assessment. – Upon receipt from the court of an order for an assessment, two members of the board as designated by the administrative officer of the board shall conduct an assessment of the offender to determine if the offender is a sexually violent predator. Such an assessment shall include, but not be limited to, such factors as:

(1) Age of the offender.

(2) Offender's prior criminal record, sexual offenses as well as other offenses.

(3) Age of the victim.

(4) Whether the offense involved multiple victims.

(5) Use of illegal drugs by the offender.

(6) Whether the offender completed any prior sentence and whether the offender participated in available programs for sexual offenders.

(7) Any mental illness or mental disability of the offender.

(8) The nature of the sexual contact with the victim and whether the sexual contact was part of a demonstrated pattern of abuse.

(9) Whether the offense included a display of unusual cruelty by the offender during the commission of the crime.

(10) Any behavioral characteristics that contribute to the offender's conduct.

All State, county and local agencies shall cooperate in providing the necessary information as requested by the board in connection with the required assessment.

(d) Submission of report by board. – The board shall submit a written report containing its assessment to the court no later than 60 days from the date of conviction of the defendant. Where the board members disagree on the assessment of the offender, both members shall submit a written report to the court.

(e) Court review of findings. – Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

(f) Subsequent board review. – No sooner than one year prior to release from a State or county correctional institution, or in five-year intervals thereafter, an offender designated as a sexually violent predator may

petition the court with original jurisdiction in the matter for reconsideration of the determination. The court may review the determination and request a new report by the board. The court may enter an order terminating the designation in which case the court shall notify the Pennsylvania State Police.

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§ 9795. Registration of offenders

(a) Registration of sexually violent predators. – A sexually violent predator shall be required to register all current addresses with the Pennsylvania State Police upon release from incarceration, upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation. The offender shall inform the Pennsylvania State Police within ten days if the offender changes residence. The offender shall register with a new law enforcement agency no later than ten days after establishing residence in another state. The registration shall continue unless the court determines the person is no longer a sexually violent predator as provided in section 9794(f) (relating to designation of sexually violent predators). Where the offender has been granted parole by the Pennsylvania Board of Probation and Parole, the board shall collect registration information from the offender and forward that registration information to the Pennsylvania State Police. The Department of Corrections shall not release the offender until it receives verification from the Pennsylvania State Police that it has received the registration

information. Where the offender is scheduled to be released from a State correctional facility due to the expiration of the maximum term of incarceration, the Department of Corrections shall collect the information from the offender no later than ten days prior to the maximum expiration date. The Department of Corrections shall forward the registration information to the Pennsylvania State Police. Where the offender scheduled to be released due to the maximum expiration date refuses to provide the registration information, the Department of Corrections shall notify the Pennsylvania State Police of the failure to provide registration information and of the expected date, time and location of the release of the offender. The chief county probation and parole official in cooperation with a county correctional facility shall, in accordance with established guidelines, obtain the required information contained in section 9799.2(2) (relating to duties of Pennsylvania Board of Probation and Parole) regarding offenders released from a county sentence and to submit the information to the Pennsylvania Board of Probation and Parole and the Pennsylvania State Police. The offender in a county correctional facility shall not be released from incarceration or released to a sentence of probation or intermediate punishment until the information has been obtained and submitted as required.

(b) Court information for all offenders. – The sentencing court shall inform offenders designated in section 9793 (relating to registration of certain offenders for ten years) and sexually violent predators designated in subsection (a) at the time of sentencing of the provisions of this subchapter. The court shall:

(1) Specifically inform the offender of the duty to register and obtain the information required for each registration.

(2) Specifically inform the offender of the duty to inform the Pennsylvania State Police within ten days if the offender changes residence.

(3) Specifically inform the offender of the duty to register with a new law enforcement agency if the offender moves to another state no later than ten days after establishing residence in another state.

(4) Order the fingerprints and photograph of the person to be provided to the Pennsylvania State Police upon sentencing.

(5) Require the offender to read and sign a form stating that the duty to register under this subchapter has been explained. Where the offender is incapable of reading, the court shall certify the duty to register was explained to the offender and the offender indicated an understanding of the duty.

(c) Offenders from other states. – As a condition of obtaining residency in Pennsylvania under the interstate compact for the supervision of parolees and probationers, sexual offenders from other states shall be required to register and abide by the requirements of this subchapter and, where the Pennsylvania Board of Probation and Parole determines it is necessary to protect the public, shall submit to public notification as provided in section 9798 (relating to other notification).

(d) Penalty. – Any offender who fails to register with the Pennsylvania State Police as required in this section commits a felony of the third degree.

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§ 9796. Verification of residence

(a) Quarterly verification. – The Pennsylvania State Police shall verify the residence of sexually violent predators every 90 days through the use of a nonforwardable verification form to the last reported address. The form shall be returned by the offender within ten days.

(b) Annual verification. – The Pennsylvania State Police shall verify the residence of offenders designated in section 9793 (relating to registration of certain offenders for ten years) annually through the use of a residence verification form. The form shall be returned by the offender within ten days.

(c) Notification of law enforcement agencies of change in address. – A change of address of an offender required to register under this subchapter reported to the Pennsylvania State Police shall be immediately reported by the Pennsylvania State Police to the appropriate law enforcement agency having jurisdiction of the offender's new place of residence. The Pennsylvania State Police shall, if the offender changes residence to another state, notify the law enforcement agency with which the offender must register in the new state.

(d) Failure to provide verification. – Where any offender fails to provide verification of residence within the ten-day period as set forth in this section, the Pennsylvania State Police shall immediately notify the municipal police department of the offender's last verified residence. The local municipal police shall locate the offender and arrest him for violating this section. The municipal police jurisdiction exists. The Pennsylvania State Police shall assist any municipal police department requesting assistance with locating and arresting an offender who fails to verify his residence.

(e) Penalty. – Any offender who fails to verify his residence as required in this section commits a felony of the third degree.

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§ 9797. Victim notification

(a) Duty to inform victim. –

(1) Where the offender is determined to be a sexually violent predator by a court under section 9794(e) (relating to designation of sexually violent predators), the local municipal police department or the Pennsylvania State Police where no municipal police jurisdiction exists shall give written notice to the offender's victim when the offender registers initially and when he notifies the Pennsylvania State Police of a change of address. This notice shall be given within 72 hours after the offender registers or notifies the Pennsylvania State Police of a

change of address. The notice shall contain the offender's name and address or addresses where he resides.

(2) A victim may terminate the duty to inform set forth in paragraph (1) by providing the local municipal police department or the Pennsylvania State Police where no local municipal police department exists with a written statement releasing that agency from the duty to comply with this section as it pertains to that victim.

(b) Where an offender is not designated as a sexually violent predator. – Where the offender is not determined to be a sexually violent predator by a court under section 9794(e), the offender's victim shall be notified in accordance with section 479.3 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.[1]

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§ 9798. Other notification

(a) By municipality's chief law enforcement officer. – Notwithstanding any of the provisions of 18 Pa.C.S. Ch. 91 (relating to criminal history record information), the chief law enforcement officer of the police department of the municipality where a sexually violent predator lives shall be responsible for providing written notice as required under this section.

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[1] 71 P.S. § 180.9.3.

(1) The notice shall contain:

(i) The name of the convicted sexually violent predator.

(ii) The address or addresses at which he resides.

(iii) The offense for which he was convicted.

(iv) A statement that he has been designated by court order as a sexually violent predator, which designation has or has not been terminated as of a date certain.

(v) A photograph of the sexually violent predator, if available.

(2) The notice shall not include any information that might reveal the victim's name, identity and residence.

(b) To whom written notice is provided. – The chief law enforcement officer shall provide written notice, under subsection (a), to the following persons:

(1) Neighbors of the sexually violent predator.

(2) The director of the county children and youth service agency of the county where the sexually violent predator resides.

(3) The superintendent of each school district and the equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality.

(4) The director of each licensed day care center and licensed preschool program in the municipality.

(5) The president of each college, university and community college located within 1,000 feet of a sexually violent predator's address.

(c) Urgency of notification. – The municipal police department's chief law enforcement officer shall provide notice within the following time frames:

(1) To neighbors, notice shall be provided within 72 hours after information of the sexually violent predator's release date and address has been received by the chief law enforcement officer. Notwithstanding the provisions of subsections (a) and (b), verbal notification may be used if written notification would delay meeting this time requirement.

(2) To the persons specified in subsection (b)(2), (3), (4) and (5), notice shall be provided within seven days after the chief law enforcement officer receives information regarding the sexually violent predator's release date and address.

(d) Public notice. – All information provided in accordance with subsection (a) shall be available, upon request, to the general public.

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§ 9799. Immunity for good faith conduct

The following entities shall be immune from liability for good faith conduct under this section:

(1) The Pennsylvania State Police and local law enforcement agencies and employees of law enforcement agencies.

(2) District attorneys and their agents and employees.

(3) Superintendents, administrators, teachers, employees and volunteers engaged in the supervision of children of any public, private or parochial school.

(4) Directors and employees of county children and youth agencies.

(5) Presidents or similar officers of universities and colleges, including community colleges.

(6) The Pennsylvania Board of Probation and Parole and its agents and employees.

(7) Directors of licensed day care centers and directors of licensed preschool programs.

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§ 9799.1. Duties of Pennsylvania State Police

The Pennsylvania State Police shall:

(1) Create and maintain a State registry of offenders pursuant to section 9793 (relating to registration of certain offenders for ten years).

(2) In consultation with the Office of Attorney General and the Pennsylvania Board of Probation and Parole, promulgate guidelines necessary for the general administration of this subchapter.

(3) Write regulations regarding neighbor notification of the current address of sexually violent predators.

(4) Notify, within 72 hours of receiving the offender's registration, the chief law enforcement officer of the police department having primary jurisdiction of the municipality in which an offender resides of the fact that the offender has been registered with the Pennsylvania State Police pursuant to sections 9795 (relating to registration of offenders) and 9796 (relating by verification of residence).

(5) In consultation with the Department of Education and the Pennsylvania Board of Probation and Parole, promulgate guidelines directing licensed day-care centers, licensed preschool programs, schools, universities and colleges, including community colleges, on the proper use and administration of information received under section 9798 (relating to other notification).

(6) Immediately transfer the information received from the Pennsylvania Board of Probation and Parole under section 9799.2(2) and (3) (relating to duties of Pennsylvania Board of Probation and Parole) and the fingerprints of the sexually violent predator to the Federal Bureau of Investigation.

All guidelines and regulations promulgated under this section shall be published in the Pennsylvania Bulletin no later than January 1, 1996.

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§ 9799.2. Duties of Pennsylvania Board of Probation and Parole

The Pennsylvania Board of Probation and Parole shall:

(1) Create a notification form which will inform State and county prison and probation and parole personnel how to inform offenders required to register under this subchapter of their duty under the law.

(2) In cooperation with the Department of Corrections and other Commonwealth agencies, obtain the following information regarding offenders:

(i) Name, including any aliases.

(ii) Identifying factors.

(iii) Anticipated future residence.

(iv) Offense history.

(v) Documentation of any treatment received for the mental abnormality or personality disorder.

(vi) Photograph of the offender.

(3) Immediately transmit the information in paragraph (2) to the Pennsylvania State Police for immediate entry into the State registry of sexual offenders and the criminal history record of the offender as provided in 18 Pa.C.S. Ch. 91 (relating to criminal history record information).

§ 9799.3. Board

(a) Composition. – The State Board to Assess Sexually Violent Predators shall be composed of psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders.

(b) Appointment. – The Governor shall appoint the board members.

(c) Term of office. – Members of the board shall serve four-year terms.

(d) Compensation. – The members of the board shall be compensated at a rate of $200 per assessment and receive reimbursement for their actual and necessary expenses while performing the business of the board. The chairman shall receive $500 additional compensation per annum.

(e) Staff. – Support staff for the board shall be provided by the Pennsylvania Board of Probation and Parole.

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§ 9799.4. Sexually violent predators

(a) Increased mandatory maximum sentence. – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime

notwithstanding lesser statutory maximum penalties for these offenses.

(b) Counseling. – The sexually violent predator shall be required to attend at least monthly counseling sessions in a program approved by the board and be financially responsible for all fees assessed from such counseling sessions. If the sexually violent predator can prove to the satisfaction of the court that the person cannot afford to pay for the counseling sessions, that person shall still attend the counseling sessions and the parole office shall pay the requisite fees.

(c) Mandatory sentence. – Notwithstanding any other provision of law to the contrary, when a person who has been designated as a sexually violent predator is convicted of a subsequent sexually violent offense, the mandatory sentence shall be life imprisonment. Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the offender shall have the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

(d) Authority of court in sentencing. – There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (c), to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania

Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

(e) Appeal by Commonwealth. – If a sentencing court refuses to apply this section when it is applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for the imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

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§ 9799.5. Exemption from notification

Nothing in this subchapter shall be construed as imposing a duty upon a person licensed under the act of February 19, 1980 (P.L. 15, No. 9), known as the Real Estate Licensing and Registration Act,[1] or an employee thereof to disclose any information regarding an offender required to register under this act.

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§ 9799.6. Applicability

The provisions of section 9793(d) (relating to registration of certain offenders for ten years) shall apply to all

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[1] 63 P.S. § 455.101 et seq.

offenders convicted of an offense equivalent to an offense set forth in section 9793(b) before the effective date of this section who remain incarcerated or on parole on the effective date of this section. In addition, the provisions of section 9793(d) shall apply to all offenders convicted of an offense equivalent to an offense set forth in section 9793(b) on or after the effective date of this section.

Supreme Court, U.S.
FILED
NOV 26 1999
CLERK

No. 99-752

In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

JOSE LUIS COLLAZO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of a rebuttable presumption in a proceeding under the Pennsylvania Sexual Offender's Act, in which a court must make the factual determination of whether a convicted sex offender qualifies as a Sexually Violent Predator and is therefore subject to a maximum sentence of life imprisonment in excess of any sentence he/she could otherwise lawfully receive, improperly shifts the burden of proof to the offender in violation of his/her right to due process under the Fourteenth Amendment?

Answered in the affirmative by the Pennsylvania Supreme Court.

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OPINIONS BELOW

The July 30, 1999 Order of the Pennsylvania Supreme Court denying the Petitioner's Petition for Allowance of Appeal from a March 23, 1999 decision of the Pennsylvania Superior Court, is unpublished and has been reprinted in the Appendix of Petitioner at App. 4. *Commonwealth v. Collazo*, No. 0404 M.D. Alloc. Dkt. (Pa., July 30, 1999). The Order cites to and relies upon a prior decision, *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593 (June 30, 1999), which is reprinted in the Appendix of Petitioner at App. 41 in its unpublished form. The March 23, 1999 Judgment and Memorandum Opinion of the Pennsylvania Superior Court reversing the trial court, is unpublished and has not been reprinted by the Petitioner. *Commonwealth v. Collazo*, No. 927 Harrisburg 1998 (Pa. Super., March 23, 1999). A May 7, 1998, opinion and order of the trial court denying a claim of ineffective assistance of counsel raised by Respondent on post-sentence motion, is unpublished and has been reprinted in the Appendix of Petitioner at App. 9. *Commonwealth v. Collazo*, No. 816 C.A. 1997 (Com. Pleas York Co., May 7, 1998). A March 12, 1998 Order of the Pennsylvania Superior Court remanding an appeal by Mr. Collazo for consideration of *nunc pro tunc* post-sentence motions on the claim of ineffective assistance of counsel is unpublished, and has not been reprinted by Petitioner. *Commonwealth v. Collazo*, No. 929 Harrisburg 1997 (Pa. Super., March 12, 1998). An October 29, 1997 Opinion of the trial court declaring that Respondent's constitutional challenges have been waived, is an unpublished opinion, and has not been reprinted by Petitioner. *Commonwealth v.*

Collazo, No. 816 C.A. 1997 (Com. Pleas York Co., October 29, 1997).

STATEMENT OF JURISDICTION

On November 1, 1999, H. Stanley Rebert, Esquire, the District Attorney of York County, Pennsylvania, filed a Petition for Writ of Certiorari from the July 30, 1999, unpublished Order of the Pennsylvania Supreme Court in *Commonwealth v. Jose Luis Collazo*, No. 0404 M.D. 1999 Alloc. Dkt. (July 30, 1999), pursuant to Supreme Court Rule 10(c), 28 U.S.C. § 1257(a). Respondent's Brief in Opposition is filed within thirty days of November 1, 1999, pursuant to Supreme Court Rule 15(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause contained in Section 1 of the Fourteenth Amendment of the United States Constitution states as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant Pennsylvania statute, contained in Title 42, Subchapter H of the Pennsylvania Consolidated Statutes, entitled "Registration of Sexual Offenders," is

attached to the Petition For A Writ Of Certiorari at App. 95.

STATEMENT OF THE CASE

Procedural History

Respondent adopts the statement of procedural history presented by Petitioner at pages 3 to 7 ("Concise Statement Of The Case") of the Petition For A Writ Of Certiorari.

The Statute

Pennsylvania's Registration of Sexual Offenders Act, 42 Pa.C.S.A. §§ 9791 to 9799.6, provides for three major classifications: 1) Offenders; 2) Out-of-State Offenders; and 3) Sexually Violent Predators. "Offenders" are persons convicted of enumerated sex offenses that range from first degree misdemeanors to first degree felonies. Under the Act, "Offenders" must register with the state police for a period of ten years. "Out-of-State Offenders" are persons convicted of any of the same range of offenses in another state, who have had the supervision of their parole or probation transferred to Pennsylvania. Under the current version of the statute, this classification of persons is subject to public notification, in addition to the requirement of registration.

It is the third classification that has been at issue in the present case. A "Sexually Violent Predator" is a person convicted of any crime in the above range of offenses that has occurred after the passage of the Act, where a

court has subsequently determined that the offender meets the definition contained in the statute. The most significant consequence of this adjudication is set forth in Section 9799.4(a) of the Act, as follows:

> (a) **Increased mandatory maximum sentence.** – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

In addition, if the individual in custody is ever subsequently paroled,[1] he or she is subject to public notification and lifetime registration.

The definition of "sexually violent predator" is similar to the definition this Court dealt with in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2085 (1997). Under Section 9792 of the Act, the term is defined as follows:

> **"Sexually violent predator."** A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that

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[1] In Pennsylvania the Parole Board has been given "exclusive power to grant or deny parole to a prisoner." *Rogers v. Board of Probation and Parole*, 555 Pa. 285, 289, 724 A.2d 319, 321 (1997). A prisoner has no right to appellate review from a Parole Board decision denying parole. *Id.* at 292, 724 A.2d at 323.

> makes the person likely to engage in predatory sexually violent offenses.

The definition of "mental abnormality" states:

> **"Mental abnormality."** A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

The term "personality disorder" is not defined in the statute. The term "predatory", however, is defined as "[a]n act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization." 42 Pa.C.S.A. § 9792. Finally, a "sexually violent offense" is defined as any offense listed in Subsection 9793(b) of the Act, which includes a selection of sexual offenses ranging from indecent assault as a misdemeanor in the first degree (punishable by a term of two and a half to five years), to rape as a first degree felony (punishable by a term of ten to twenty years), plus the crime of kidnapping a child (except by a parent) and certain crimes involving a minor "relating to [the production of] obscene and other sexual materials and performances."

The adjudicatory procedure established by the Act starts with an assessment and report prepared by a "State Board to Assess Sexually Violent Predators," which consists of "psychiatrists, psychologists and criminal justice experts" appointed by the Governor. 42 Pa.C.S.A. §§ 9794, 9799.3. The Board is guided in its determination by a presumption that the defendant is a "sexually violent

predator," which may be rebutted by clear and convincing evidence, although "[t]he offender does not participate in the assessment proceeding by the Board," *Williams, supra,* 733 A.2d at 596. The Act declares:

> (b) **Presumption.** – An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

42 Pa.C.S.A. § 9794(b). The court hearing referred to in subsection (e) operates as follows:

> (e) **Court review of findings.** – Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted

to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

42 Pa.C.S.A. § 9794(e).

REASONS FOR OPPOSING THE WRIT

THE PENNSYLVANIA SUPREME COURT HAS INVOKED PRINCIPLES OF LAW REPEATEDLY ARTICULATED BY THIS COURT TO REJECT IN THIS UNIQUE STATUTE THE APPLICATION OF A REBUTTABLE PRESUMPTION IN AN ADJUDICATORY PROCEEDING USED TO DETERMINE FACTS THAT WOULD RESULT IN THE ENHANCEMENT OF PUNISHMENT FAR BEYOND THE STATUTORY MAXIMUMS THAT COULD LAWFULLY BE IMPOSED FOR THE RANGE OF CRIMINAL OFFENSES AT ISSUE HERE.

Petitioner fails to specify the precise constitutional issue it would have this Court address if its Petition For Writ Of Certiorari were granted. Within its "Statement For Reasons Allowing The Writ" the Petitioner speaks broadly about the flexible application of Due Process standards, and touches upon other constitutional issues, such as the impact of the statute upon a defendant's right against double jeopardy, and against cruel and unusual punishment. What must be at issue, however, is the holding of the Pennsylvania Supreme Court.

In that court's Order denying a Petition for Allowance of Appeal, the Pennsylvania Supreme Court cites to its recent decision in *Commonwealth v. Donald Francis Williams*, ___ Pa. ___, 733 A.2d 593 (June 30, 1999). In *Williams*, the Court focused upon the application of a

rebuttable presumption in a post-verdict adjudicatory proceeding in which it is determined whether a defendant should be declared a "Sexually Violent Predator" under the Registration of Sexual Offenders Act and subjected to a mandatory maximum sentence of life, as opposed to the lesser maximum sentence that he was eligible for under the crime of which he was convicted. The holding of the Pennsylvania Supreme Court is narrowly phrased:

> Given our view . . . that the proceeding set forth in the Act to determine whether one is a sexually violent predator is a separate factual determination, the end result of which is the imposition of criminal punishment, we hold that anything less than the full panoply of relevant protections which due process guarantees is violative of the Fourteenth Amendment. Accordingly, we find the Act's imposition of the presumption that a person convicted of a predicate offense is a sexually violent predator, and the requirement that the offender rebut the presumption, to be constitutionally repugnant.

Williams, supra, 733 A.2d at 603 (footnote omitted).

In enacting the Registration of Sexual Offenders Act, the Legislature adopted a model incorporated within a series of statutes passed during the post-World War II years, which were later struck down by this and other courts relying upon the Due Process Clause of the Fourteenth Amendment. *See Specht v. Patterson,* 386 U.S. 605, 608, 87 S.Ct. 1209 (1967) (Colorado Sex Offenders' Act); *United States ex rel. Gerchman v. Maroney,* 355 F.2d 302, 304 (3rd Cir. 1966) (Barr-Walker Act; 19 PS §§ 1166-1174); *Commonwealth v. Dooley,* 209 Pa.Super. 516, 232 A.2d 45 (1967) (Barr-Walker Act). At the time that these cases

were decided, and repeatedly thereafter, this Court described the scheme promulgated by these statutes as "a separate criminal proceeding" which was "radically different" from a mere sentencing proceeding, and within which a defendant is entitled to the full panoply of due process protections. *See Specht, supra* at 608-09, 87 S.Ct. at 1211-12; *McMillan v. Pennsylvania*, 477 U.S. 79, 89, 106 S.Ct. 2411, 2418 (1986); *Almendarez-Torres v. United States*, ___ U.S. ___, 118 S.Ct. 1219, 1230 (1998) ("the Colorado defendant in *Specht* was 'confronted with "a radically different situation" from the usual sentencing proceeding,' " quoting *Specht* and *McMillan*). Thus, in *Specht*, this Court explained:

> The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public. . . . That is a new finding of fact that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.

386 U.S. at 608-09, 87 S.Ct. at 1211-12 (citation omitted).

The Pennsylvania Supreme Court reasonably and correctly interpreted Pennsylvania's statute as being like those already found constitutionally lacking. After a careful analysis of the applicable provisions of the Registration of Sexual Offenders Act, the Court declared:

> Initially, we note that the proceedings whereby one is determined to be a sexually violent predator set forth in the Act are more akin to the

> provisions found in *Specht* and *Gerchman* than the provisions at issue in *McMillan*. As in *Specht* and *Gerchman*, the determination of whether one is a sexually violent predator is a separate factual question that commences following an offender's conviction of one of the specified offenses found in the Crimes Code.

Williams, 733 A.2d at 601.

McMillan, supra, involved only a sentencing proceeding. The factor that distinguishes a hearing under the Registration of Sexual Offenders Act from the "mere sentencing proceeding" in *McMillan* is that a person convicted of any one of the predicate offenses listed in Subsection 9793(b) of the present Act cannot be sentenced to the enhanced term of life imprisonment, unless they have been separately adjudicated a Sexually Violent Predator. In *McMillan*, the defendant challenged the imposition of a five year mandatory sentence that was based upon a finding made at a sentencing hearing that he "visibly possessed a firearm" during the course of a robbery. *Id.* at 81. This Court held, by a five to four vote, that due process did not require the state to prove the visible possession of a firearm by a burden of proof greater than "a preponderance of the evidence." This Court distinguished the circumstances in *McMillan* from those in *Specht*, stating that the mandatory sentencing statute in *McMillan*

> . . . neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already

> available to it without the special finding of a visible possession of a firearm.

McMillan, supra at 87-88, 106 S.Ct. at 2417. The significance of this distinction has been repeatedly noted by this Court. *See Witte v. United States*, 515 U.S. 389, 401, 115 S.Ct. 2199, 2207 (1995); *Schad v. Arizona*, 501 U.S. 624, 644 n.9, 111 S.Ct. 2491 (1991).

The Pennsylvania Court relied upon this distinction in reaching its conclusion, since this is precisely what occurs when a person is adjudicated a "Sexually Violent Predator." *See Williams, supra*, 733 A.2d at 601. The language of the Legislature could not be more straightforward:

> § 9799.4. Sexually violent predators
>
> (a) **Increased mandatory maximum sentence.** – Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

42 Pa.C.S.A. § 9799.4 (emphasis in original). The lesser statutory penalty applicable to the respondent's predicate offense (indecent assault as a misdemeanor in the first degree) carries a maximum sentence of five years. *See* 18 Pa.C.S.A. § 1104(1). The Pennsylvania Supreme Court had good reason to describe the Registration of Sexual Offenders Act as establishing something "radically different" from the sentencing proceeding at issue in *McMillan*. *Williams*, 733 A.2d at 602.

Despite the interpretation given to the Act by the Pennsylvania Supreme Court, the Petitioner suggests that the burden of proof at a Sexually Violent Predator hearing can be shifted to the defendant by requiring him to disprove by clear and convincing evidence that he fits the complex definition of a Sexually Violent Predator. This assertion, however, is directly contrary to the decisions of this Court that discuss this issue, starting with *Specht*. Ironically, the language that was used in *Specht* to describe the minimum procedural protections appropriate under the Colorado statute came from the decision that declared the Barr-Walker Act unconstitutional – the statute in Pennsylvania that has served as a model for the current legislation. *See Gerchman, supra*. Quoting from *Gerchman*, this Court stated:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.
>
> We agree with that view.

386 U.S. at 610-11, 87 S.Ct. at 1212 (citation omitted), *quoting United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 304 (3rd Cir. 1966).

The "protections" defended by Petitioner are "niggardly" indeed. The rebuttable presumption of Section 9794(b), which requires that a defendant prove that he is not a Sexually Violent Predator by "clear and convincing evidence," is no protection at all. Indeed, although the rebuttable presumption is applied by the assessment board, the accused is deprived of any opportunity to even make rebuttal in that crucial forum. The accused may not appear before that Board, present evidence, cross-examine witnesses, or argue his case. *See Williams*, 733 A.2d at 596. He is forced to rebut the board's report at a later hearing, after the decks have been stacked against him.

The opportunity to rebut a presumption would not be a sufficient Due Process "protection" even in the context of a *Hendricks* type proceeding, where a judge's determination of fact results in a lesser deprivation of liberty – an involuntary commitment to a mental health facility. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072 (1997). In contrast, here the ultimate consequence may be that a defendant is eligible for thirty or fifty years of incarceration in a penal institution, above and beyond the maximum sentence the defendant could otherwise lawfully receive. While the difference between life imprisonment and a five year term (or even a twenty year maximum sentence for the most serious predicate offense listed by this Act, 18 Pa.C.S.A. § 1103(1)) is difficult to quantify, it is easy to understand. It is a significant period of punishment, and a severe deprivation of liberty.

Moreover, the increased sentence is not the only consequence of an adjudication under the Registration of Sexual Offenders Act. Another consequence is public

notification – if the inmate is ever paroled.[2] Once a person has been adjudicated a Sexually Violent Predator, the local police are required to provide written notice of the name, address, photograph and the status of that individual as a "Sexually Violent Predator" to all persons living in his/her neighborhood, and to a wide variety of other recipients. 42 Pa.C.S.A. § 9798. Quoting from a recent decision of the Third Circuit, the Pennsylvania Supreme Court emphasized,

> that notification puts the registrant's livelihood, domestic tranquility, and personal relationships all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least [as long as the notification continues]. As the New Jersey Supreme Court recognized in *Doe* [*v. Poritz*, 142 N.J. 1, 662 A.2d 367 (N.J., 1995)], a registrant thus has a compelling interest in an accurate and reasonable disposition of the issues before the court in a Megan's Law hearing.

Williams, supra at 606, quoting *E.B. v. Verniero*, 119 F.3d 1077, 1107 (3rd Cir. 1997), *cert. denied, Verniero v. W.P.*, 522 U.S. 1110, 118 S.Ct. 1039 (1998).

In *Verniero*, which involved a civil proceeding that dealt solely with public notification, the Third Circuit concluded that the State must prove its case by "clear and convincing evidence." *Verniero, supra* at 1111. There the fact finder was required to make a determination concerning an accused's future dangerousness; a task which

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[2] *See* footnote 1, *supra*.

the circuit court characterized as "an undertaking involving substantial uncertainty." *Id.* at 1108. Here the fact finder is required to make a similar, complex adjudication of fact; one nearly identical to that made by the civil court in *Kansas v. Hendricks, supra,* which was required to determine whether an offender had a "mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." In upholding the statute in *Hendricks,* this Court emphasized that the Kansas Legislature had "provided strict procedural safeguards," including placing the burden upon the state to prove its case beyond a reasonable doubt. *Hendricks, supra* at 368-69, 117 S.Ct. at 2085. In light of *Specht, Hendricks* and *Verniero,* the Pennsylvania court properly rejected the suggestion that the burden of proof could be shifted and placed upon the defendant.

This Honorable Court should not grant the Petition For A Writ Of Certiorari.

CONCLUSION

For the reasons stated above, respondent respectfully requests that a writ of certiorari to review the decision below be denied.

Respectfully submitted,

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